

13460

No. _____

Supreme Court of Illinois

Putnam, et al.

vs.

T
Fitz.

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STATE OF ILLINOIS---THIRD DIVISION.

SUPREME COURT, APRIL TERM, 1861.

CHARLES E. PUTNAM ET ALS.	}	Error to Sup. Court of Chicago.
PLAINTIFFS IN ERROR,		
vs.		
CALEB D. FITTZ,		
DEFENDANT IN ERROR.		

POINTS AND BRIEF FOR DEFENDANT IN ERROR.

I.

The United States Circuit Court had jurisdiction of the subject matter of the suit, and of the persons of the defendants, including the plaintiffs in this suit.

The proceedings in that suit resulted in the sale and conveyance to the defendant of the lot in controversy, by the commissioner appointed by the Court.

On the trial of this suit, which is ejectment, in the Court below, the decree of United States Circuit Court was objected to, because of an imperfect description of the premises ordered to be sold. This objection comes too late. It should have been made in the suit while pending in the United States Circuit Court, and it cannot be raised collaterally in this action. An irregularity cannot be the ground of an objection presented collaterally.

Rigg vs. Cook, 4 Gilm., 348.

Buckmaster vs. Carlin, 3 Seam., 105.

Swiggart vs. Harber, 4 Seam., 371.

II.

If there be uncertainty and ambiguity in the description, there is proof enough in the case to show that the United States Circuit Court intended to order the several lots, owned by Duncan at his death and located in the eighty-acre tract described in the decree, to be sold to satisfy the debt due the United States.

Blakely vs. Bestor, 13 Ill., 708.

Bank of Mobile vs. Planter's Bank, 8 Ala., 772.

III.

The executors appointed by the will of Duncan had the power to sell and convey the real estate of the testator according to their sound discretion. The language of the will authorizing the executors to "sell, barter, exchange and convey, according to a like (sound) discretion, *any property*, including debts, stock and choses in action, of whatsoever nature and wheresoever situated," is a sufficient authority to sell and convey the lot to the defendant.

1 *Jarman on Wills*, 570, *et seq.*

Clark vs. Hyman, 1 Dev., 382.

Den vs. Payne, 5 Hayw., 104.

Smith vs. Coffin, 2 H. B., 445.

14 *East.*, 370.

Evans vs. Evans, 9 Adol. & E., 720.

IV.

While it is true that the administrator with the will annexed would not succeed by virtue of his office to the personal trust and power to sell and convey real estate, as decided by this Court in *Hall vs. Irwin*, 2 Gilm., 181, yet in this case the testator conferred expressly by the terms of the will the personal trust and power on the administrator. This was sufficient.

Battle vs. Parks, 2 Mich., 531.

Rev. Stat. of Ill., 1845, Chap. CLIX, Sec. 93.

V.

The provisions of the will directing the claim of the United States to be defended to the last extremity, was not a prohibition on the administration from conveying real estate to pay the judgment or the decree.

The presumption is, that the suit had been defended to the last extremity. But it resulted in a judgment at law for the amount. No further defence could be made to that suit. The creditor's bill was merely to have satisfaction of the judgment at law. The property of Duncan, was ordered by the decree to be sold. It was sold and conveyed. There is no uncertainty in the description of the lot conveyed to the defendant. It was owned by Duncan at his death, and was part of his lands lying in Duncan's addition to Chicago.

The administrator, then, in addition to his conveyance as commissioner, conveyed as administrator with the Will annexed. It may still be his duty to petition Congress to refund the value of the property, but whether he discharges that duty or not, cannot affect the rights of the defendant, an innocent purchaser for a valuable consideration.

VI.

The administrator's deed is valid. When a person has no estate in premises, but only a power to sell, and his conveyance can be made operative only by treating it as an execution of the power to sell, it will be so considered.

Jones vs. Wood, 16 *Penn. St. R.*, 4 *Harris*, 25.

18 *Miss.*, 3 *Bennet*, 220.

2 *Watts*, 185.

8 *Barr.*, 418.

4 *Kent Comm.*, 335.

8 *Vesey*, 616.

2 *Bing.*, 497.

H. B. STEVENS,

For Defendant in Error.

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Caleb D. Fitts
at the suit of

Charles E. Putnam
et al

Argument for

Settled in court

Filed May 2, 1861
L. Leland
Clerk

1861

State of Illinois, 3rd Grand Division
Charles E. Putnam & al
vs
Caleb D. Fitz } Error to Superior Court
Supreme Court April Term 1862.

It is stipulated and agreed
by & between the parties in the
above entitled suit that the writ
of error shall be dismissed,
and that each party shall pay
thereon costs; and that further
the plaintiffs in error may
withdraw the record or such
part thereof as the Court may
permit.

Mather & Taft
W. C. Goudy
for plffs in Error
Caleb D. Fitz
Def't in Error.

177 at Apr. 2. 1861
Charles E. Putnam & al
vs
Caleb D. Fily.

Agreement.

Filed May 5, 1862
A. Keland
Clerk

SUPREME COURT,

THIRD DIVISION.

April Term, 1861.

CHARLES E. PUTNAM *et al.*, }
vs. } *Error to Superior Court of Chicago.*
CALEB D. FITTZ.

ABSTRACT.

2 The plaintiffs in error commenced an action of ejectment to recover
the possession of lot 7, block 8, Duncan's Addition to Chicago, Cook
county, in the Superior Court of Chicago, against the defendant in error,
claiming an estate in fee.

7 The defendant plead the general issue, on which issue there was a
8 trial before the Hon. Van H. Higgins, one of the judges, a jury being
waived, and the defendant found not guilty.

9 The plaintiffs moved for a new trial, which was overruled and judg-
ment rendered for costs, to which the plaintiffs excepted.

10 Upon the trial, it was stipulated that the plaintiffs might have judg-
ment for such share or estate as they or either of them might be entitled
under the evidence, without amendment of the declaration.

11 The plaintiffs, in support of the issue on their part, first read in
evidence, without objection, a patent from the Governor of Illinois to
William H. Brown, granting in fee the E $\frac{1}{2}$ N. E. $\frac{1}{4}$ 17, 39 N., 14 E., in
Cook county, containing 80 acres, reciting that the same was canal land,
selected, sold, etc., which was dated on the 1st day of July, 1831.

13 The plaintiffs then read, without objection, a map of Duncan's Ad-
dition to Chicago, with the certificates, proving that William H. Brown
had laid out said E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ 17, 39 N., 14 E., into 380 town lots in

14 30 blocks, properly numbered, with streets dividing the blocks, and
15 caused a survey to be made July 10, 1853, that a map thereof was
made, the division called "Duncan's Addition to Chicago," and the
same acknowledged by Brown on the 28th day of April, 1836, and
recorded the next day. And it appeared therefrom, that the premises
described in the declaration was one of these lots.

16 The plaintiffs then read in evidence a deed from William H. Brown
and wife to Joseph Duncan, dated and acknowledged 15th June, 1836,
and recorded 29th July, 1836, conveying with covenants, in fee, the
17 "following described lots and parcels of land, situate in Duncan's Addition
to Chicago, being in the county of Cook aforesaid, to wit: Lots three (3),
seven (7), nine (9) and fourteen (14), in block one (1); lots fourteen (14),
ten (10), eight (8) and three (3), in block two (2); lots two (2), seven (7),
eight (8) and fourteen (14), in block three (3); lots three (3), six (6),
nine (9) and eleven (11), in block four (4); lots two (2), seven (7), nine
(9), and thirteen (13), in block seven (7); lots one (1), seven (7) and
nine (9), and fourteen (14), in block eight (8); lots two (2), six (6), nine
(9) and twelve (12), in block nine (9); lots one (1), five (5), ten (10) and
thirteen (13), in block ten (10); lots three (3), six (6), nine (9) and thir-
teen (13), in block eleven (11); lots two (2), five (5), nine (9) and eleven
(11), in block twelve (12); lots two (2), six (6), ten (10) and sixteen (16),
in block (13); lots three (3), six (6), nine (9) and thirteen (13), in block
fourteen (14); lot one (1), in block twenty-six (26); lot two (2), in block
twenty-seven (27); blocks nineteen (19), thirty (30) and six (6); block
twenty-three, (23), with the exception of lot nine, as laid down upon the
map or plat of said addition."

21 It was then admitted that Joseph Duncan, the grantee in the last
deed, died testate in January, 1844, leaving Elizabeth C. Duncan, his
widow, and children born in wedlock, of whom Joseph Duncan, Julia
S. Duncan and Mary L. D. Putnam, three of the plaintiffs, were the
only heirs at law, at the commencement of this suit, and that one of
them, Mary L. D. Putnam was married to Charles E. Putnam, the other
plaintiff, in December, 1854.

It was further admitted that the defendant was in possession of the
premises described in the declaration at the commencement of this suit.

Thereupon the plaintiffs rested.

23 The defendant then proposed to read in evidence on his part an
exemplification of a record from the Circuit Court of the United States,
for the District of Illinois, (which it was admitted was full and complete
touching the matters in controversy in this suit) of proceedings in Chan-
cery, wherein the United States were complainants, and the widow and

children and heirs of Joseph Duncan, and James M. Duncan, William Brown and Daniel C. Pierson, the executors nominated in the will, and William Thomas, administrator, with the will annexed of Joseph Duncan, were defendants.

The exemplification of the proceedings exhibited a bill, answer of the administrator with the will annexed, decrees, and report of sale of certain real estate.

25 The bill states that Joseph Duncan, with others, securities of William Linn, as receiver of public moneys for the Vandalia land district, together with Linn, as principal, gave an official bond in the sum of one hundred thousand dollars, conditioned for the faithful performance, by
45 Linn, of his duties, and that the condition of the bond was broken by the said Linn during the lifetime of Duncan, whereby the bond was forfeited; that the debt was not paid, or any part of it; that Joseph Duncan died seized and possessed of real and personal estate, and of choses in
32 action, bonds and mortgages, and made a will on the 14th January, 1844, a copy of which is given as Exhibit B. The bill states the death of Duncan, 15th January, 1844, leaving a widow and children; that the
34 executors named were qualified, and entered on the discharge of their duties, and that the letters testamentary were subsequently revoked, and letters of administration, with the will annexed, were granted by
35 the probate justice of the peace of Morgan county, to William Thomas, on the 13th July, 1844, who took possession of the assets and entered on the discharge of his office. The bill states that all the parties to the
bond except Duncan were insolvent, and that the United States, at the December term, 1844, commenced suit and recovered a judgment at law upon the bond against William Thomas, administrator, with the will annexed, for \$48,151.61 and costs, to be paid in due course of administration, on which judgment *fi. fa.* was issued, and returned *nulla bona*.

37 The bill claimed a discovery, under oath, of lands, assets and effects,
42 to satisfy the judgment at law.

The bill was filed at the June term, 1846.

The only answer or discovery made, was by William Thomas, administrator, with the will annexed, which was filed on the 9th day of June, 1846.

56 The answer of Thomas, administrator, admits the execution of the bond; the death of Duncan; the execution and publication of will; the nomination, qualification and removal of executors, and his own appointment; he admits the judgment at law and return of *fi. fa. nulla bona*.

57 The answer admits personal property of various kinds, and also that Duncan "died seized of a large number of tracts of land and town lots, situated in different parts of the State of Illinois, and also a number of town lots situated in Duncan's addition to the city of Michigan, Laporte county, Indiana;" and the answer then states as follows:

58 "This defendant herewith *files as part of his answer a descriptive list of said lands and town lots*, as far as the same has come to his knowledge. This defendant states in regard to said lands and lots, that he has never been able to find any descriptive list of the lands and lots which said Duncan claimed at the time of his death. The defendant has examined the title papers of said Duncan and his receipt for taxes; he has also examined the records in a number of counties, and the *list now exhibited was made by this defendant from examination made as aforesaid*. It may not in all respects *be accurate*. Lands may be included which did not belong to the said Joseph Duncan at the time of his death, *and some lands which did belong to him may be omitted*."

62 After answering the interrogatories as to personal assets, the answer then proceeds as follows, to wit:

"This defendant, further answering said bill, says that being advised that he had power under and by virtue of the last will and testament of the said Joseph Duncan, to sell and convey the real estate of which said Duncan died seized, proposed about a year since to proceed to the selling of said real estate, and *requested the complainant to appoint an agent to attend to the said sales*, but the legal officers of the said complainant expressed some doubt in regard to the power of the defendant to sell as aforesaid, *and this suit was thereupon instituted by CONSENT AND REQUEST OF THIS DEFENDANT, in order that a sale might be made so as to rest purchasers with good title*."

63 This defendant further answering said bill, states that in redeeming lands from sales for taxes and incumbrances growing out of such sales, he has in many instances taken conveyances to himself in his fiduciary capacity."

64 Attached to and filed with the answer is the "descriptive list of real estate" referred to in the answer and made a part of it, which has the following caption, columns and headings to the columns, together with a large list of lands and town lots, a part of which is hereafter set forth, including the *only tract or lot* described as in Cook county, to wit:

64 "List of lands and real estate belonging to the estate of Joseph Duncan, deceased."

County.	Parts of Section.	Section.	Township.	Range.	Quantity.
Adams.	S.W.	24	2 N.	9 W.	160
Cass.	S.E. S.E.	14	17 N.	12 W.	40
	N.W. N.W.	32	18	8	40
	E $\frac{1}{2}$ SW.	31			80
	NW. NE.	23	17	12	40
	Lot 2, Block 9; Lot 4, Block 21; Beardstown.				
65 Cook.	$\frac{1}{4}$ E $\frac{1}{2}$ N.E.	17	39	14	20
Clark.	$\frac{1}{2}$ Lot 3.	15	10 N.	11 W.	40
	$\frac{1}{2}$ W. $\frac{1}{2}$ Lot 4.	"	"	"	40

75 When town lots are described, they are set out in appropriate columns, with headings for lots and blocks.

77 On the 5th June, 1846, there was a hearing as to the question of dower of Mrs. Duncan.

78 On the 9th June, 1846, the court rendered a decree allowing dower in all the real estate, and, by consent of parties, appointed commissioners to admeasure it.

80 On the same day the commissioners reported, estimating the value
81 of the real estate at \$40,000, and the (then) value of the dower in money
82 at \$7,760, which was approved, and a decree rendered that she be permitted to purchase in her own right such property as would amount to the value of her dower, and in case she does not so purchase that amount of property that the whole or such part as remained be paid out of the first proceeds of the sale by the commissioner appointed for that purpose.

84 On the same day the cause was heard on bill, answers, replication
85 and proofs, and a decree was rendered, finding the indebtedness to complainants, and that the personal estate was insufficient to pay the amount, "and that said Joseph Duncan died seized of lands and real estate situated in the State of Illinois, located and described as follows:

(In the original decree as set out in the record here is set out in full the lands embraced in the answer of William Thomas, and amongst them the following piece or lot of land):

86 "One quarter of the east half of the north-east quarter of section seventeen (17), township thirty-nine (39) north range fourteen (14), Cook county, Illinois."

87 The decree then orders the sale of the real estate aforesaid, or so
much thereof as will satisfy the debt at public auction, for cash and
proceeds. "It is further ordered that William Thomas be and is hereby
appointed special commissioner and master to make the sale aforesaid,"
88 at such time and place as he might appoint, giving at least six weeks
notice in some newspaper, and that he convey to the purchasers upon
their complying with the terms of sale.

On the 12th June, 1847, William Thomas, commissioner, filed his
report, commencing as follows:

90 "In obedience to and in the execution of the decree of sale, entered
in this cause at the June term, 1846, of said court, I caused a notice to
be published in the Chicago Journal, a public newspaper, published in
Chicago, Cook county, Illinois, on the twenty-second day of June, 1846,
stating in substance that I would attend at the Court House, in Chicago,
on the fourth day of August, A. D. 1846, between the hours of 9 o'clock
A. M. and 6 o'clock P. M., and offer for sale at public vendue for cash,
all of that part of the east half of the north-east quarter of section
seventeen, in township thirty-nine north of range fourteen east, of which
Joseph Duncan died seized, *stating also that one-fourth of said lot of
land was conveyed to said Joseph Duncan by William H. Brown*, of
which Duncan's Addition to the city of Chicago is composed, and that
the sale would be of all lots embraced in said addition, except such as
were conveyed by said Joseph Duncan in his lifetime, which notice was
published in said paper for six weeks in succession before said day of
sale. I also published a like notice in the newspaper, published in the
city of Chicago, called the Chicago Daily Journal. And at the time
and place specified in said notice, I attended and offered for sale at
public vendue to the highest bidder for cash, the lots referred to in said
notice, and of which the said Joseph Duncan died seized, and said lots
were stricken off and sold as hereinafter specified, each purchaser being
the highest bidder for the lot purchased."

93 Then follows a statement of notices in other counties as to lands in
those several counties, to which is added *a list of lots* in Duncan's
Addition to Chicago, *described by the numbers of the lots and blocks*,
showing that each lot was offered and sold, giving the name of the pur-
chaser, and the sum each lot sold for, and among these is the following:

94 "Lot seven, in block eight, at forty dollars, to C. D. Fittz. \$40."

No confirmation or approval of the sale was made. The money
was paid as directed by the Court.

The other portions of the record relate to the question of dower.

The defendant, in connection with the exemplification, proposed to read in evidence a deed, as follows:

135

"This deed, executed this 4th day of August, A. D. 1846, between William Thomas, *Commissioner, appointed as and for the purposes hereinafter stated*, of the first part, and Caleb D. Fittz, of the City of Chicago, of the second part, *witnesseth*, that whereas, at the June term," &c., [*reciting the decree for sale of June 9, 1846.*] "And whereas the said Thomas, in the execution of said decree, and in conformity with the requirements thereof, published a notice in the Chicago Journal, a public newspaper published weekly in Chicago, Illinois, on the 22d day of June, 1846, stating in substance that he would attend at the Court House in Chicago, on, &c., and offer for sale at public vendue, to the highest bidder for cash, all that part of said real estate which is situated in the County of Cook, describing it by its appropriate numbers; and at the time and place specified in said notice, the said Thomas attended and offered for sale, in the manner and upon the terms stated in said notice, the following lot, situated in Duncan's Addition to the original Town now City, of Chicago, and the said Caleb D. Fittz being the highest and best bidder, became the purchaser of lot number seven in block number eight, at forty dollars, and said purchase money being paid, the said Thomas, in consideration of the premises, and by virtue of the power vested in him, does hereby grant and convey unto the said party of the second part, the lot aforesaid, together with all and singular the appurtenances thereto belonging. *Said Thomas doth also hereby grant and convey all right, title and claim which has or may be vested in him, in his right as administrator*, in and to the lot aforesaid, to have and to hold the same unto him, the party of the second part, and his heirs and assigns forever.

137

In testimony whereof, the said Thomas hereto signs his name and affixes his seal, the date first herein written.

WM. THOMAS, *Com'r and Adm'r of* [SEAL.]

JOSEPH DUNCAN, *deceased.*

138

STATE OF ILLINOIS, } ss.
Cook County. }

I, Alonzo Huntington, a Notary Public within and for said County, in the State aforesaid, do hereby certify that William Thomas, whose name is subscribed to the foregoing deed, and by whom the same appears to have been executed, as *Commissioner*, and who is known to me to be the same person whose name is so subscribed, this day appeared before me and acknowledged the execution thereof to be his act and deed.

Given under my hand, &c."

Certificate of record, March 23, 1850.

139 The plaintiffs objected to the exemplification and deed, and each of them, but the Court overruled the objections and admitted the evidence, to which the plaintiffs excepted.

139 The defendant then read, without objection, a certified copy of the will of Joseph Duncan, with the record of probate thereof, in Morgan county, and copies of the letters testamentary, and of administration with the will annexed.

The will is dated January 14, 1844, and proved January 18, 1844.

The material parts of the will for the purposes of this case are as follows :

139 "Secondly. I will the payment of all my honest and just debts and funeral expenses."

* * * * *

141 "Item. I wish the suit of the United States now pending against myself and others, as sureties of William Linn, late receiver of public money's at the land office, Vandalia, Illinois, *to be defended to the last extremity, and if my estate is forced to pay the defalcation of Linn, as sought to be recovered in said suit or any part of it, I direct my executors to petition Congress year after year, until the amount so unjustly collected shall be refunded to my estate.*"

* * * * *

142 "Item. After the full satisfaction and discharge of all the provisions of this will, I will and bequeath that the residue of my property, whether real, personal or mixed, of whatsoever nature and wheresoever situated, be equally divided betwixt my children and the offspring of any who may have died leaving such, share and share alike."

* * * * *

143 "Item. I hereby invest my said executors with full power to compromise, adjust and compound and settle any debts, demands or claims, in my favor or against me, according to their sound discretion, and to execute deeds to lands, where I have given bonds and the consideration money has been paid, and also to sell, barter exchange and convey, according to a like discretion, any property, including debts and stock and choses in action I may own, of whatsoever nature and wheresoever situated."

* * * * *

145 "*Item.* Should it ever be necessary to appoint an administrator or an administrator *de bonis non* of my estate, with the will annexed, then I *will and direct and invest* such administrator, or administrator *de bonis non*, with each and every power herein conferred upon my executors."

The defendant then rested.

154 The plaintiffs then, upon their part, read in evidence a deed from William H. Brown and wife to Joseph Duncan, dated 17th January, 1835, conveying in fee, land in Cook county, Illinois.

155 "One undivided fourth part of the east half of the north-east quarter of section seventeen, township thirty-nine north, range fourteen east, supposed to contain twenty acres," acknowledged and recorded March 4, 1835. And also another deed from Joseph Duncan and wife to William H. Brown, dated June 1st, 1836, *reconveying* the same premises to Brown by the same description, acknowledged and recorded 8th October, 1838.

The defendant objected to these deeds, but the court overruled the objections and allowed them in evidence.

161 The plaintiffs then proved that the debt mentioned in the bill of complaint filed by the United States, was the same mentioned in the will of Joseph Duncan, as in suit then pending against him and others, as sureties of William Linn; and further, that there was no consideration paid by the defendant for the premises described in the deed of William Thomas to him for the estate of said Duncan, or to be used by him as administrator of said estate or assets, except the sum of forty dollars, paid by the defendant at the sale of said commissioner, which sum was paid to Thomas, as commissioner, reported to the court as such, and applied in pursuance of the order of said court which evidence was objected to, but received by the court.

162 It was also admitted that all of the lots described in the deed from Brown and wife to Duncan, of June 15, 1836, and not offered and sold by Thomas, were conveyed by Duncan in his lifetime.

This was all the evidence.

The court then found the issue for defendant, and plaintiffs moved for a new trial, but the court overruled the motion, to which the plaintiffs excepted.

The court then rendered judgment for the defendant, to which the plaintiffs excepted.

9

The plaintiffs now prosecute a writ of error to this court, and assign as errors the following, to wit:

1st. The Superior Court erred in admitting improper evidence on the part of defendant.

2nd. The Superior Court erred in overruling the plaintiffs motion for a new trial.

3rd. The Superior Court erred in finding the issue and rendering judgment for the defendant instead of the plaintiffs.

W. C. GOUDY,

Attorney for Plaintiff in Error.

177-26

Chas E. Putnam

vs

C. D. Fitz

Abstract

13460

Filed Apr 28 1861

H. L. Linn

Chas

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