No. 12214

Supreme Court of Illinois

Davenport

---

vs.

Young, et al

P&S

State of Illinois }
Cook County } ss.

Pleas Before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at a Vacation Term of Said Court Begun and holden at the Court House in the City of Chicago in said County on the first Monday being the Third day of April in the Year of our Lord one Thousand Eight Hundred and fifty four and of the Independence of the United States the Seventy Eighth

Present The Hon John M. Wilson Judge
Cyrus P. Bradley Sheriff
Attest Walter Kimball Clerk

Be it Remembered that Heretofore to wit on the Second day of January in the Year one Thousand Eight Hundred and fifty four comes Timothy R. Young and Margaret E. Young his wife by Blackwell and Beckwith their Attornies and files in the office of the Clerk of the Said court their Declaration and notice in Ejectment which said Declaration and notice and affidavit thereunto attached is in the words and figures following To wit

State of Illinois
Cook County Court } Of the January Term A.D. 1854
of Common Pleas

Cook County ss. Timothy R. Young and Margaret E Young his wife of Marshall in the County of Clark and State of Illinois by Blackwell and Beckwith their Attornies complains of Gideon Davenport of Chicago in the County of Cook & State of Illinois in a plea of Trespass and

[1811-17]

Ejectment— For that— whereas the said Plaintiff Margaret E Young on the 23 day of June A.D. one Thousand Eight— Hundred and fifty three in said State of Illinois was possessed of certain Tract or parcle of Land with the appertenances situated in the County of Cook in the State of Illinois and described as follows. To wit— Part of the East— half of the north west Fractional Quarter of Section Twenty— Eight= Township forty north of Range fourteen East of the third principal Meridian — Bounded as follows commencing at the center of Lake Shore ditch one hundred and Eight— Rods and Sixteen links East of the South west corner of said Quarter Section thence Running East— to Lake, thence north Twelve degrees and Twenty five minutes west five chains and two links — thence west Twenty one chains and ninety— Seven Links to the center of Lake Shore Ditch — thence Southerly along the center of said Ditch to the place of Beginning which said premises the said plaintiff Margaret E Young claims in fee, and they the said plaintiffs being so possessed thereof the said Defendant afterwards to wit on the same day and Year last aforesaid Entered into the said premises and Ejected the said plaintiffs therefrom and from the time last aforesaid has unlawfully withheld and does now unlawfully withhold from the said plaintiff the possession thereof to the Damages of the said plaintiffs ~~the possession~~ of the Sum of one thousand Dollars and therefore they Bring Suit— &c

Blackwell & Beckwith.
Attorneys for Plaintiffs

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To Gideon W. Davenport of Chicago in the County of Cook and State of Illinois

You are hereby notified that the Declaration with a copy whereof You are now herewith served and to which copy this notice is subjoined will be filed in the Cook County Court of common Pleas on the first day of the next term of said court to be held at the City of Chicago in the county of Cook and State of Illinois on the first monday of January A.D. 1854. and that upon filing the same a rule will be Entered Requiring you to appear and plead to the said Declaration within twenty days after the entry of such Rule - and that if You neglect to appear and plead a Judgment by Default will be Entered against You and the Plaintiffs will Recover possession of the premises Specified in the said Declaration

Dated this Twenty Seventh day of October A.D. 1853

Yours &c Blackwell & Beckwith

Attorneys for Plaintiffs

State of Illinois }
County of Cook } ss.

I John M Morton Deputy Sheriff of said County being first duly sworn on my Oath Depose and say that on the fourteenth day of November A.D. 1853 at and within said County I Served the above Declaration and notice upon Gideon W. Davenport the Defendant therein named by Delivering to him in person true copies thereof - and further affiant saith not

John M Morton

Sworn & Subscribed to Before me this 2nd day of Jany A.D. 1854

W Kimball clerk

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And on the same day To wit on the second day of January in the Year Eighteen Hundred and fifty four the said day being one of the days of the January Term of said court the following proceedings were had in said cause and Entered of Record To wit

Timothy R. Young et
Margaret E. Young
vs
Gideon W. Davenport } Ejectment

And now upon this day come the said plaintiffs by Blackwell & Beckwith their attornies and file herein their Declaration and notice in Ejectment and it appearing to the court that the said defendant has been duly served with a copy of the Declaration of said plaintiffs against him and notice thereto attached according to the Statute in such case made and provided, on motion of said plaintiffs attornies It is ordered that the said Defendant Gideon W Davenport plead to said plaintiffs Declaration in this cause within twenty Days or in default thereof that Judgment be Entered against him for want of plea

And afterwards To wit on the Twenty Seventh day of January one thousand Eight Hundred and fifty four comes the said defendant by Collins & Williams his attornies and files in said cause his plea which said plea is in the words & figures following To wit

Of the February Term of the
Cook County Court of common pleas
in the Year of our Lord one
Thousand Eight Hundred & fifty four

Timothy B Young &
Margaret Young
vs
Gideon Davenport

And the said Gideon W. Davenport by Collins and Williams his attornies comes and Defends the force and Injury when &c and Says that he is not Guilty of the said supposed trespass and Ejectment above laid in their charge or of any part thereof in manner & form as the said Timothy B. Young and Margaret E Young hath above thereof complained against And of this he the said Gideon W. Davenport puts himself upon the County &c

Collins & Williams
Defts Attys

And afterwards to wit on the sixth day of April in the Year one thousand Eight Hundred & fifty four the said day being one of the days of the April vacation Term of said court in the Year aforesaid the following proceedings were had in said cause and Entered of Record in said Court to wit

Timothy B Young &
Margaret Young
vs
Gideon Davenport
} Ejectment

And now upon this day comes the said Plaintiffs by Blackwell & Beckwith their attornies

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and the Defendant by Collins & Williams his Attornies also come and issue being Joined herein By agreem't of parties this cause is Submitted to the Court for Trial without the intervention of a jury, and the Court by the like agreement and consent of the parties finds Judgment Pro forma for the plaintiffs and the said defendant Guilty of withholding the premises mentioned & Described in said Plaintiffs Declaration, as charged in said Declaration against him — Therefore it is considered that the said plaintiffs do have and Recover of the said defendant the premises Described in their said Declaration as follows To wit — the East half of the north west fractional Quarter of Section Twenty Eight Township forty north of Range fourteen East of the third principal Meridian — Bounded as follows commencing at the center of Lake Shore ditch one hundred & eight Rods & Sixteen links East of the South west corner of said quarter Section, thence Running to Lake thence North twelve degrees & twenty five minutes west five chains & two Links thence west twenty one chains & ninety seven links to the center of the Lake shore ditch thence Southerly along the center of said ditch to the place of Beginning and that a writ of possession issue therefor and that said Plaintiffs also Recover of said defendant their costs by them in this Behalf Expended and have Execution therefor —

It was thereupon further agreed by the parties that a record of the pleadings and bills of Exceptions in this cause certified by the Clerk

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of this Court- shall be filed in the Supreme Court- for a hearing without- the issuing of process from that- court-, and that- either party shall have the right- to a new trial under the Statute in the Court- below (this court-) at his election after the judgment of the Supreme Court- shall be rendered in the premises

Cook County- Court
of common pleas
Timothy- R. Young
Margaret- E Young
Vs
Gideon W. Davenport
} Ejectment-

Be it Remembered that- at the april Term of the Cook County Court- of common pleas this cause came on to be heard + by agreement of parties a jury waived in the said cause and the cause is submitted to the Honorable John M, Wilson judge of said Court- on the Sixth- day of April A.D. 1857 for Trial and thereupon on the trial of the issue in said cause the following facts are admitted by the counsel + the Plaintiffs and Defendant-.

That- David L W Jones intermarried with Frances Whitlock August- 8th A.D. 1831- That- there was issue of this marriage Margaret- E Jones who was born on the 18th day of May A.D. 1832. That- the said David L W Jones died Intestate on the 19th day of August A.D. 1836- that- Frances the Widow of the said Jones Intermarried with Seth Paine in the month

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of October 1836 and that the said Margaret E, Jones the Heir of the said David L. W. Jones intermarried with Timothy B Young one of the said plaintiffs on the 14th day of January 1852 that the said Margaret is the co-plaintiff of the said Young - that the said Jones left no other Heir than the said Margaretta that the said Defendant claimed title to and Exercised acts of ~~said~~ Ownership over the premised Decribed in the Declaration in this cause at the time of the Service of the said Declaration upon him a that a Patent issued from the United States to David L W Jones on the 1st of October 1839 for the East half of the N. W. Fractional Quarter of Section 28 Township 40, north of Range 14 East of which premises the said Jones Died Seized by virtue of a certificate of purchase upon which said Patent was issued - all which was admitted by the defendant and thereupon the Plaintiffs Rested their case

The Defendant then offered to Prove that at the time of the sale of the property in question by Seth Paine all the personal property belonging to the Estate of Jones had been applied to the payment of the Debts against his Estate - and that there were debts against the Estate at the time of the Sale although none appear to have been proved up in the Probate Court against the same and there were no judgments against Jones -

To which Testimony the Plaintiffs objected & the objection being Sustained by the Court the Defendant then & there Excepted

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It was thereupon Admitted by the Plaintiffs that the Land sold to Newhall by Paine Being the Land a part of which is described in the Declaration in this Cause) was Wholly uncultivated & unproductive at the time of the Sale & always had been - That at that time it was and had been incapable of any productive Improvement and if it had been could not have been made productive without a large outlay of money which neither the Infant (Mrs Conroy) nor Paine had to use for the purpose

The Defendant then offered to prove by Oral Testimony that the Sale to Newhall was not in fact made or the contract or deeds Executed & Delivered (although dated the day before) until after the Bond Required by the act had been Executed and approved by the Probate Justice and filed in his office nor until after the consent of Mrs Paine had been in fact filed by and in the office of the Probate Court of Cook County -

To the admission of which the Plaintiffs objected and the Objection being sustained by the Court - the defendant then and there Excepted -

The Plaintiffs then Admitted that Mrs Paines consent was Executed by her freely and voluntarily & without coercion or undue influence on the part of her Husband - and that the price at which the Land was sold by Paine was all that it was worth or would bring at

the time Either at Public or private Sale

The Plaintiffs also admitted

That the Terms upon which said Sale was made to wit One fourth in cash & the Residue in one two & three years with Interest payable annually on the whole sum were the ordinary Terms of Canal & other Sales of land in Chicago at the time & That these terms were fully complied with by the Purchasers and a deed duly Executed

The contract Between Newhall & paine was Introduced in Evidence as follows

Articles of Agreement made and concluded the fifth day of July in the Year one thousand Eight hundred and forty Seven Between Seth Paine Administrator of the Estate of D L & O Jones deceased late of Cook County party of the first part and Harrison Newhall of said County party of the Second part Witnesseth That said party of the first part at the Request of the party of the second part and in consideration of the Money to be paid and the covenants as herein Expressed to be performed by the party of the second part (the prompt performance of which payments and covenants being a condition precedent and time being essence of said condition hereby agree to sell to the said party of the second part All that certain Lot and parcle of Land Situate in the County of Cook and State of Illinois known & distinguished as the East half of the north west fractional Quarter of section twenty Eight in Township Forty north of Range ten East of the third Principal Meridian of the State of

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Illinois — with the privileges & appurtenances thereunto Belonging — and the said party of the Second part — in consideration of the premises hereby agrees to pay to the said party of the first part — his Heirs Executors Administrators or assigns the Sum of seven Hundred and eighty Dollars as follows — Six Two Hundred Dollars in hand, Two Hundred Dollars in one Year from date. Two Hundred Dollars in two Years from date — and One Hundred and Eighty Dollars in three Years from — date — with Interest — at the Rate of Six per cent per annum from the fifth day of July 1847. To be paid annually on the whole sum from time to time Remaining unpaid And also that he will well and faithfully and in due season pay or cause to be paid all ordinary Taxes assessed for Revenue purposes upon said premises or any part thereof Subsequent to the Year 1847. And also all other assessments which now are or may be hereafter charged or assessed upon or against said premises or any part thereof — But in case the said party of the Second part fail to pay any or all such Taxes or assessments upon said premises or appurtenances or any part thereof whenever and as soon as the same shall become due or payable and the party of the first part shall pay from time to time any or all such Taxes or assessments or cause the same to be paid the amount of any & all such payments so made by the party of the first part shall immediately thereupon become an additional consideration — and payment to be made by the

party of the second part hereto for the premises herein agreed to be conveyed.

And the said party of the first part further covenants and agrees with the said party of the second part that upon the faithful performance by the said party of the second part of his undertaking in his behalf and of the payment of principal and interest of the sums above mentioned in the manner specified the said party of the first part shall and will without delay well and faithfully Execute acknowledge and deliver in person or by attorney duly authorized to the party of the second part his heirs or assigns a deed or conveyance of all Right Title and Interest of the party of the first part of in and to the above described premises with their appurtenances with covenants of warranty against any act or thing done or suffered by the party of the first part And it is mutually covenanted and agreed by and between the parties hereto that in case Default shall be made in any of the payments of principal or Interest at the times above specified for the payment thereof and for fifty days thereafter this agreement and all the preceding provisions hereof shall be null & void and no longer Binding at the option of the said party of the first part his Representatives or assigns and all the payments which shall have been made hereon or pursuance hereof absolutely & forever forfeited to the said party of the first part or at the Election of the said

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party of the first part his Representatives and assigns the covenants and liability of the said party of the second part shall continue and Remain obligatory upon the said party of the second part and may be Enforced and the said consideration money and Every part thereof with the annual Interest as above Specified be collected by proper proceedings in Law or Equity from the said party of the second part his Heirs Executors Administrators or assigns

And it is further Mutually covenanted and agreed by and Between the parties hereto that in case of default in the payments Stipulated to be made by the said party of the second part or any part thereof and the election of the party of the first part his Representatives or assigns to consider the foregoing contract of sale at an End and prior payments forfeited ~~the said~~ said party of the second part his heirs Representatives or assigns who may have possession or the right of possession of said premises at the time of such Default or at any time thereafter shall be considered and are hereby agreed and declared to be in Law and Equity the tenant & tenants at will of said party of the first part his Representatives and assigns on a Rent Equal to an Interest of Ten per cent per annum on the whole amount of the purchase money above Specified payable Quarterly Yearly from the day of such default in payment of principal of Interest and after such Default in payment and election to consider the above contract of sale as void

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the said party of the first part his Representatives & assigns shall and may have and Exercise all the powers Rights and Remidies provided by Law or Equity to collect such Rents or Remove such Tenant or Tenants the same as if the Relation of Landlord and Tenant hereby Declared were created by an original Absolute Lease for that purpose on a Specified Rent payable Quarterly on a Tenure at will And that in such case the said tenant or tenants shall and will pay or cause to be paid all Taxes and assessments ordinary & Extraordinary which may be laid or assessed on said premises or any part thereof during the continuance of such tenancy and will not commit or suffer any waste or damage to said premises or the appurtenances but will keep and deliver up on the termination of such tenancy the said premises and appurtenances in as good order and Repair (ordinary wear and decay and unavoidable injury by the Elements excepted) as they were at the commencement of such tenancy

In Witness whereof the party of the first part and the party of the second part in his proper Person have hereunto Respectively set their Hands and seals on the day and year first above written

Sealed & Delivered
In presence of
Orlando Davidson

"Seth Paine (Seal)

"Harrison Newhall (Seal)

X

X X

{12214-14}

col

The Plaintiffs also Admit=

That Mrs Young at the time of the sale had no other propery or means to provide for her maintainence and education. and that the Bond was made before the Sale is perfectly solvent at this time to the extent of the penalty and more and that Newhall the original purchaser was surety upon the Bond & that the Bond was solvent when taken=

The defendants then offered to Prove that Mrs Young was consulted about the sale at the time it was made and desired to have the property sold in conformity to and for the purposes mentioned in the law that at that time she was about sixteen years of age.

To the admission of which the plaintiffs objected and the objection being sustained by the court the defendants then and there excepted"=

The Plaintiffs then admitted the Title deeds of the Defendant as follows = dispencing with copies in this Bill. 1st A deed executed under the Power contained in said Law by Seth Paine as administrator of said estate and also by his wife to Harrison Newhall dated the fifth day of August 1851, = for the E½ N W Frac ¼ 28, 40" 14"

2nd Deed from Harrison Newhall and wife to the defendant and Erastus S Williams of the undivided ⅔ds of a parcle of land in said deed mentioned which said land included the lands in the declaration

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described & part and parcle of the land mentioned and described in this deed from paine to Newhall.

3rd Deed from Harison Newhall and wife to Charles D Dyer of the undivd 1/3 of some tract described in the last mentioned deed

4th Deed from Charles D Dyer and wife & Erastus S Williams and wife of the land in the declaration in this cause mentiond & described. (Copies of all of which deeds are by agreement dispenced with)

By Agreement of Parties the act of the legislature of the State of Illinois authorizing the Administration of the Estate of David L W Jones to do certain acts was then admitted in Evidence and made part of the Evidence in this cause in words & figures as follows to wit

An act authorizing the sale of the Real Estate of D. L. W. Jones deceased and for other purposes Section 1st

Be it enacted &c. that the Administrator of the Estate of David L W Jones deceased late of Cook County Be and he is hereby authorized to sell at Public or private sale such of the Real Estate of the said deceased as is situated within this State and the Territory of Michigan the proceeds whereof shall be applied to the liquidation of the debts of the said decedent and the Residue to be invested in some productive Real property or public Securities under the advice and with the consent of the Judge of probate

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of said County of Cook for the use & Benefit of the Widow and Child of the deceased in the proportions severally due them according to the law - in such case

Section 2d The said Administrator previous to making sale of any of said property shall enter into Bond for the faithful performance of the duties herein provided in such penalty and with such surety as shall be prescribed by the Judge of probate of Cook County and with such other conditions as should be deemed by said Judge necessary and proper to be inserted for the purpose of effectually securing to the widow & Heirs of the deceased their several portions of the proceeds of such sale — Provided that no Sale shall be made of any of said property — by virtue of this act without the written consent of the said widow shall be first filed in the office of the said judge of Probate

James Semple
Speaker of the H. R.
A M. Jenkins
Speaker of the Senate

This Bill having been laid Before the council of Revision and ten days not having intervened Before the Adjournment of the General assembly and the said Bill not having been returned with the objections of the council on the first day of the present Session of the Gen Assembly the same has become a law

Given under my hand this 4th day of Dec 1826

A P Field — Sec of State

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Office of Sec of State

Vandalia Jany 31. 1837

I A. P. Field Do hereby certify the foregoing to be a correct Transcript of the Original Bill on file in my office

In Testimony whereof I have hereunto placed my name & affixed the Seal of State Done at Vandalia this 31st day of Jany. 1837

A. P. Field Sec of State

In Relation to the estate of David A W Jones deceased the Records of the Probate court of Cook County were then by the consent of parties introduced & read in evidence in this cause & the original certified copy thereof is by agreement of Parties annexed to this Bill of exceptions and marked exhibit "A" and is to be deemed and taken as a part thereof

The Plaintiffs then offered in evidence the printed journals of the Senate & House of Representatives of Illinois for the session Beginning on the 4th of December 1835 to the admission of which the defendant objected and the objection being over ruled by the court the defendant then and there Excepted.

By Agreement of Parties said printed journals may be read in the Supreme court without their Being Incorporated or any part of them into this Bill of Excepting the defendant reserving the objection to their introduction as evidence for any purpose whatsoever

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The case being then submitted to the court Judgment was Rendered for the Plaintiff pro forma and thereupon the defendants prayed an appeal, and asked that this his Bill of Exceptions be signed and sealed which is accordingly done —

John M Wilson (Seal)

Exhibit

This Indenture made this fifth day of August in the Year of our Lord one thousand Eight hundred and fifty one — Between Seth Paine Administrator of the estate of David L W Jones late of Cook County deceased and Frances Paine late the widow of the said David L W Jones deceased and now the wife of the said Seth Paine of the City of Chicago county of Cook and State of Illinois Parties of the first part and Harrison Newhall of the same place party of the second part, Witnesseth

Whereas the said Seth Paine as Administrator of the Estate of said Jones — By and with the written consent of the said Frances Paine duly filed in the office of the Probate Justice of Cook County and after first entering into a Bond to the People of the State of Illinois for the faithful performance of his duties as Provided in the act of the General Assembly of the State of Illinois entitled An act authorizing the Sale of the Real Estate of

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D. L. W. Jones deceased and other purposes in force the sixth day of December 1836 in such penalty and with such security and such other conditions as were prescribed and deemed necessary & proper by the Probate Justice of Cook County aforesaid for the purpose of effectually securing to the widow & heirs of the said Jones their several portions of said estate - did on the fifth day of July eighteen hundred and forty seven enter into a contract with said Harrison Newhall to sell & convey to him by a deed of conveyance - all that certain Lot piece or parcle of land situate lying & being in the said County of Cook being a part of the Real estate whereof the said Jones died seized known and distinguished as the east half of the north west Fractional quarter of Section Twenty eight in Township Forty north of Range fourteen east of the third principle meridian for the sum of seven Hundred and eighty dollars to be paid by said Newhall - To wit - Two Hundred dollars cash in hand - Two Hundred dollars in one year after the date of said contract Two Hundred dollars in Two Years and one Hundred and eighty dollars in three Years from the date of said contract

And whereas the said Newhall has paid to the said Pain as such Administrator as aforesaid the said several sums of money mentioned in said contract according to the sums and conditions thereof and has fully performed

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and fulfilled the same in all things on his part & Behalf—

Now Therefore the said Indenture Witnesseth that the said parties of the first part in consideration of the said premises and of the aforesaid sum of money to paid as aforesaid have Granted Bargained and sold and by these Presents do grant Bargain and sell to the said Newhall and to his heirs and assigns forever—all the said described lot piece parcel or tract of land above mentioned and described with the tenements hereditaments & appurtenances To have and To hold the said above described premises with the privileges and appurtenances unto the said Newhall his heirs and assigns forever and the said parties of the first part for themselves their heirs Executors and administrators do covenant and agree to and with the said party of the second part his heirs and assigns that they will warrant and defend forever the aforesaid premises to be free and clear of all claim or claims of any and every person or persons claiming or to claim the said premises by through and under them or either of them and none other—

In Witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written—

Seth Paine [Seal]

Frances Paine [Seal]

In presence of
Paul A Wright—

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State of Illinois }
Kane County } S.S.

I Paul R Wright Justice of the Peace in and for said county hereby certify that Seth Paine and Frances Paine who are personally known to me to be the same persons described in and who executed the foregoing deed appeared before me this day in person and acknowledged that they had signed sealed & delivered the said deed as their free & voluntary act in the capacity & for the uses & purposes therein expressed. And the said Frances Paine wife of the said Seth Paine having been by me examined seperate & apart and out of the hearing of her said husband and the contents & meaning of the said instrument of writing having been by me made known and explained to her acknowledged that she had freely & voluntarily executed the same without any compulsion of her said husband and Relinquished her dower to the land & tenements therein mentioned and that she does not wish to Retract the same.

Given under my hand and seal this sixth day of August A.D. 1856.

Paul R Wright (Seal)
Justice of the Peace

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State of Illinois }
Kane County } ss.

I James Herrington clerk of the county court in and for said county do hereby certify that Paul B Wright whose name is subscribed to the annexed certificate of acknowledgement was at the time of taking the same an acting Justice of the Peace in and for said county duly commissioned sworn and authorized to take the same and full faith & credit is due to all his official acts That I am well acquainted with his hand writing and verily believe the said signature purporting to be his is Genuine

In Testimony whereof I have hereunto set my hand and affixed the official seal of said county court this eighth day of August A.D. 1851

James Herrington
Clerk of the County Court

State of Illinois }
Cook County } ss

Filed for Record Dec 18. 1852
and Recorded in Book No 55 of Deeds Page 604

L D Hoard
Recorder

5/12214-02

At a Special term of the Court of Probate in and for the county of Cook and State of Illinois, begun and holden at the Office of the Judge thereof in Chicago on the fifteenth day of December A.D. 1835.

Present Isaac Harmon, Judge of Probate

This day comes into Court James Whitlock and moved the court for letters of administration upon the Estate of David L. W. Jones deceased late of Cook county and State of Illinois, and it appearing to the satisfaction of the said court that the said David L. W. Jones died on or about the nineteenth day of August eighteen hundred and thirty four, having at the time of his death goods and chattels rights and credits, which may be lost, destroyed or diminished in value if speedy care be not taken of the same, to the end therefore that the same may be preserved for those who are entitled to the same it was ordered and considered by the Court that letters of administration upon the estate of the said David L. W. Jones deceased issue to the said James Whitlock, which letters of administration are as follows to wit:

State of Illinois }
Cook County } Ss. The people of the State of Illinois to all to whom these presents shall come Greeting: Know ye, that whereas David L. W. Jones of the County of Cook and State of Illinois died intestate, as it is said, on or about the nineteenth day of August eighteen hundred and thirty four having at

Exhibit "A" referred to in the Record

[illegible]

the time of his decease personal property in this State which may be lost destroyed, or diminished in value if speedy care be not taken of the same to the end, therefore that said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint James Bullock of the County of Cook and State of Illinois Administrator of all and singular the goods and chattels rights and credits which were of the said David L. W. Jones at the time of his decease; with full power and authority to secure and collect the said property and debts wheresoever the same may be found in this State and in general to do and perform all other acts which now are, or hereafter may be required of him by law. Witness Isaac Harmon, Judge of Probate in and for the said County of Cook at his office in Chicago this fifteenth day of December eighteen hundred and thirty five

Isaac Harmon, Judge of Probate.

The said Administrator also filed into Court his bond as administrator of said estate which Bond was conditioned as the law directs, with George C Walker as his security, and is as follows to wit:

Know all men by these presents that we James Bullock and George C Walker of the County of Cook, and State of Illinois are held and firmly bound unto the people of the State of Illinois in the penal sum of two hundred dollars, lawful

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money of the United States, which payment well and truly to be made and performed we and each of us bind ourselves, our heirs, Executors, administrators and Assigns jointly severally and firmly by these presents Witness our hands and seals this 15th day of December A.D. 1854.

The condition of the above obligation is such that if the above bounden James Wallace administrator of all and singular the goods and chattels, rights and credits of David L. W. Jones deceased do make or cause to be made a true and perfect inventory of all and singular the goods chattels rights and credits of the said deceased which shall come to the hands possession or knowledge of him the said James Wallace as such administrator or to the hands of any other person or persons for him, and the same so made do exhibit or cause to be exhibited in the court of Probate for the said county of Cook agreeable to law, and such goods and chattels rights and credits do well and truly administer according to law, & all the rest of the said Goods and chattels rights and credits which shall be found remaining upon the account of the said Administrator, the same being first examined and allowed by the court of Probate, shall deliver and pay unto such person or persons, respectively, as may be legally entitled thereto; and further do make a just and true account of all his

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acts and doings therein when thereunto required by the said Court, and if it shall hereafter appear that any last will and testament was made by the deceased and the same be proved in Court, and letters testamentary or of administration be allowed and obtained thereon, and the said Damer Whitlock do in such case on being required thereto render & deliver up the letters of administration granted to him aforesaid and shall in general do and perform all other acts which may at any time be required of him by law, this obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and acknowledged this fifteenth day of December eighteen hundred and thirty five in presence of Isaac Harmon

Damer Whitlock (Seal)
SE Walker (Seal)
(Seal)

State of Illinois
Cook County

I do solemnly swear, that I will well and truly administer all and singular the goods and chattels rights, credits and pay all just debts and charges against his estate, so far as his goods chattels and effects shall extend and the law charge me, and that I will do and perform all other acts required of me by law to the best of my skill and abilities, Sworn and subscribed this 15th day of December A.D. 1835 before me

Damer Whitlock

Isaac Harmon Judge of Probate for Cook county Ills

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State of Illinois }
Cook County } Ss

The People of the State of Illinois to Albin Calhoun, Albert Shepard & Levi Blake of the County of Cook and State of Illinois, Greeting, This is to authorize you jointly to appraise the goods, chattels and personal estate of David L. W. Jones late of the county of Cook and State of Illinois deceased so far as the same shall come to your sight and knowledge, each of you having first taken the Oath hereto annexed a certificate whereof you are to return annexed to an appraisement bill of said goods and chattels and personal Estate by you appraised in dollars and cents; and in the said bill of appraisement you are to set down in Colum[illegible] or columns, opposite to each article appraised the value thereof, Witness Isaac Harmon Judge of Probate for the said County of Cook, at his office in Chicago this 15th day of December A.D. 1837

Isaac Harmon Judge of Probate for Cook County Illinois.

State of Illinois }
Cook County } You and each of You do solemnly swear that you will well and truly without partiality or prejudice, value and appraise the goods chattels and personal estate of David L W Jones deceased, so far as the same shall come to Your sight or knowledge and that ~~you shall ~~ ~~to Your sight or knowledge, and that~~ you will well and in all respects perform Your duty as appraisers

[illegible]

to the best of your skill and judgment - so help you God

Sworn and subscribed before me }
this day of December A.D. 1835 }

At a special term of the court of probate in and for the county of cook and State of Illinois begun and held at the City of Chicago at the office of the Judge of probate on the thirteenth day of April A.D. 1837

Present - Charles V Dyer, Judge of Probate

Seth Paine appeared in open court and presented before the Judge the following petition in these words and figures viz "To the Hon the court of Probate for the county of cook and State of Illinois, the undersigned respectfully represent to your honor that James Whitlock late of the town of Chicago in the county of cook aforesaid administrator of the Goods chattels and estate of David L W Jones late of the county of cook deceased, has since his appointment removed out of the said county of cook, and after having commenced upon the Administration of the Estate committed to his charge, has neglected and refused to go forward with the settlement of the said Estate, and now declines and neglects to do any thing further in the matter We therefore pray that the court will revoke the said letters of administration so granted to the said James Whitlock he having expressed his desire to surrender and grant letters to some responsible person residing in the county

[12214-28]

of Cook to the end that the Estate of David L. W. Jones deceased may be speedily adjusted

Dated Chicago 13th April 1839

Seth Paine
Frances Paine

Filed on back of petition
for Record as per Apl 13th 1839
C. D. Dyer Judge of Probate

It appearing to the satisfaction of the Court that James Whitlock Administrator of all and singular the goods, chattels and personal estate of David L W Jones late of the County of Cook deceased, who is the same deceased person referred to in the foregoing petition, has removed out of the County wherein such letters Administration were granted that the said James Whitlock has for some months past neglected and refused to act in the Capacity of such administrator that he does still neglect to act, and that he declines further to act in such Capacity as administrator upon the Estate of the said Deceased.

It is therefore ordered and considered by the said Court that the letters of Administration which were granted to James Whitlock upon the Estate of David L W Jones late of the County of Cook deceased be and the same are hereby this day revoked and reinded, and that the said James Whitlock shall from this time cease to act as administrator upon the Estate aforesaid &

It is further ordered and considered by the Court that letters of administration of all and singular the goods, chattels and personal Estate of David L W Jones

[12214-29]

deceased issue to Seth Paine the Husband of the said widow of the deceased, which said letters of administration are in the following words and figures, to wit.

The People of the State of Illinois To all to whom these present shall come Greeting.

Know ye, that where as David L W Jones late of the County of Cook and State of Illinois died intestate as it is said on or about the Nineteenth day of August A D 1835 having at the time of his decease personal property in this State, which may be lost destroyed or diminished in value, if speedy care be not taken of the same; to the end therefore that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint you Seth Paine of the County of Cook and State of Illinois administrator of all and singular the goods, chattels, rights and credits, which were of the said David L W Jones at the time of his decease with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in General to do and perform all other acts, which now are or hereafter may be required ~~[illegible]~~ of him by law.

Witness Charles V Dyer, Judge of Probate in and for the County of Cook at his office in the city of Chicago this Nineteenth day of April A.D. 1837

[12214-30]

Charles V Dyer
Judge of Probate

A true copy of the original Eyd by me
C. V. Dyer
Jdg. Prob.

A Bond made by Seth Paine, Edmond D. Taylor and Josiah L. Breese conditioned for the payment of the sum of three hundred and fifty dollars, was produced and filed in the Office of the Judge of Probate and also an Oath which was filed on the same day such as is required by law for an administrator to take upon assuming his responsibilities.

A true copy of record examined by me
Charles V Dyer
Judge of Probate

Bond of Seth Paine, administrator of the Estate of David L W Snee dec'd, as filed in this office in the words and figures following, to wit.

Know all men by these Presents, that we Seth Paine, Edmund D Taylor and Josiah L Breese of the county of Cook and the State of Illinois, are held and firmly bound unto the people of the State of Illinois in the penal Sum of three Hundred and Fifty dollars current money of the United States, which payment well and truly to be made and performed, we, and each of us bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents.

[12214-8]

Witness our hands and seals this thirteenth day of April A.D. 1837.

The condition of the above obligation is such, that if the said Seth Payne, administration or of all and Singular the goods and chattels, rights and credits of David L. W. Jones, do make or cause to be made a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said deceased which shall come to the hands, possession or knowledge of him the said Seth Paine as such administrator or to the hands of any person or persons for him; and the same so made do exhibit or cause to be exhibited in the Court of Probate for the said County of Cook, agreeable to law; and such goods and chattels, rights and credits, which shall be found remaining upon the account of said administrator, the same being first examined and allowed by the Court of Probate, shall deliver and pay unto such person or persons respectively as may be legally entitled thereto and further do make a just and true account of all his acting and doings therein when thereunto required by the Court, And if it shall hereafter appear that any last Will and Testament was made by the said deceased, and the same be proved in Court, and letters testamentary or of administration be obtained thereon, and the said Seth Payne does in such case, on being required thereto, render and deliver up the letters of administration

[12214-03]

granted to him as aforesaid and shall in general, do and perform all other acts which at any time may be required of him by law: then this obligation to be void, otherwise to remain in full force and virtue

Selh Payne (Seal)
E.D. Taylor (Seal)
J L Breese (Seal)

Endorsed on Back of Bond
Filed 13th day of April A.D. 1839.
C. Dyer
Judge of Probate.

Oath of administrator as filed in this office in the words and figures following, to wit.

State of Illinois }
Cook County } Ss

In the matter of
the estate of David L W Jones
late of the County of Cook deceased.

I do solemnly swear that I will well and honestly discharge the trust reposed in me, as administrator to collect the estate of David L. W. Jones deceased according to the tenor and effect of the letters granted to me by the Judge of Probate of the said County of Cook to the best of my Knowledge and ability, so help me God.
Subscribed and sealed before } Selh Paine (Seal)
me this 13th day of April 1839 }

[12214-33]

Charles C Dyer Judge Probate
Endorsed on back,
" Filed April 19th 1847
C C Dyer judge Probate,

Jones D. L. W. Estate

At a special term of a Court of Probate held at the City of Chicago County of Cook and State of Illinois on the 20th day of December A D 1848
Present—
Thomas Hoyne
Probate Justice.

This day comes into Court Seth Paine administrator of the D L W Jones deceased and files the following certified copy of "an act authorizing the Sale of the Real Estate of D. L. W Jones deceased and other purposes" passed by the General Assembly of the State of Illinois which is ordered to be entered of record as follows, to wit:-

An Act authorizing the sale of the real estate of D L Jones deceased Section 1st

Be it enacted and that the administration of the estate of David L W Jones deceased late of Cook County be and he is hereby authorized to sell at public or private sale such of the real estate of such decedent, as is situated within this State and the Territory of Michigan

[12214-34]

the proceeds whereof shall be applied to the liquidation of the debts of said decedent and the residue to be invested in some productive real property, or public securities, under the advice and with the consent of the Judge of Probate of the said county of Cook, for the use and benefit of the widow and Child of the deceased, in the proportions severally due them according to the law in such cases

Section 2nd

The said Administrator previously to making sale of any of such property shall enter into bond for the faithful performance of the duties herein provided in such penalty and with such security, as shall be prescribed by the Judge of Probate of Cook County and with such other conditions, as should be deemed by the said Judge necessary and proper to be inserted for the purpose of effectually securing to the widow and heirs of the deceased their several proportions of the procede of such sales Provided that no sale shall be made of any of said property by virtue of said act without the written consent of the said widow shall be first filed in the office of the said Judge of Probate

James Semple
Speaker of the Hos R.

A. M. Jenkins
Speaker of the Senate

[12214-39]

This bill having laid before the Council of Revision, and ten days not having intervened before the adjournment of the Gen assembly and the said bill not having been returned with the objections of the Councie on the first day of the present Session of the Gen assembly the same has become a law.

Given under my hand this 6th day Dec 183

A B Field, Sec of State.

Office of Sec. of State.
Vandalia Jan 31st 1837

I, A B Field do hereby certify the foregoing to be a correct transcript of the original bill on file in my office.

In testimony whereof I have hereunto placed my hand and affixed the Seal of State, Done at Vandalia this 31st day of January 1838

A B Field
Sec. of State

This day also comes the said Administrator and files the following covenant in writing of Frances Paine formerly widow of A L W Jones deceased to the sale by the said Administrator of certain Real Estate herein described and it appearing to the Court that said consent had heretofore to wit, on the 6th day of July 1841 been filed and approved by the Court and that the same had not been entered of record in pursuance to law.

S12214-36

Ordered that the same be now approved and entered of record nunc pro tunc.

Lake Forest July 3rd 1847

I Frances Paine formerly widow of D.L.W. Jones do hereby consent to the sale by the administrator of the estate of said Jones of the East half of the North West fractional quarter of Section Twenty-Eight in Township Forty-North of Range Fourteen East of the third principle Meridian of the State of Illinois

Witness Enoch Church Frances Paine

(Said consent is filed on the back & follows to wit

Filed July 6th 1847

W. D. Ogden P. J. Peace")

And this day also come the Administrator aforesaid and moves the Court for an order nunc pro tunc prescribing the amount of penalty and the nature of the security to be given by said administrator previous to making any sale of Real estate under the provisions of an "Act entitled "An act authorizing the sale of the Real estate of D.L.W. Jones deceased" as above recorded and also prescribing such other considerations as may be deemed necessary to be inserted for the purpose of effectually securing to the Widow and heirs of the deceased their several portions of the proceeds of such sale.

And it appearing to the Court that heretofore to wit on the 5th day of July A.D. 1847 that the said Administrator by and with the Consent and

[12214-37]

under the direction of the then Probate Justice Mahlon D Ogden Esq had entered into Bond with the People of the State of Illinois for the use of D L W Jones in the penal Sum of one thousand six hundred dollars with Harrison Newhall as security conditioned, according to the provision of said Act and as prescribed by said Judge of Probate but that the said Consent of said Probate Judge & petition was not entered of record nor the said Bond so given by said administrator previous to making sale of the Real estate of said deceased described as aforesaid with the consent and under the of this Court, but that the same was omitted, therefore

Ordered by the Court that the said order be now entered nunc pro tunc, and that the said Bond so given as aforesaid by said administrator Selth Paine with Harrison Newhall as security as aforesaid in the penal Sum of One thousand Six hundred Dollars conditioned for the application of the money arising from the sale of the east half of the North West fractional Quarter of Section Twenty Eight (28) Township forty (40) North Range Fourteen (14) East to the Widow and heirs of the deceased be the same is hereby approved nunc pro tunc and the same entered of record as follows, to wit,

Know all men by these presents, that we Selth Paine and Harrison Newhall of cook County State of Illinois are held

and firmly bound unto the people of the State of Illinois for the use and benefit of the heirs of D L W Jones. in the Penal sum of one thousand Six hundred dollars for the payment of which well and truly to be made we bind ourselves our heirs and assigns firmly by these Presents. Witness our hands and seals at Chicago this 4th. day of July in the year of our Lord one thousand eight hundred and forty-seven

The Conditions of the above obligation is such, That whereas the above bounden Selth Paine being administrator on the Estate of D L W Jones deceased is about to sell the East ½ ~~the~~ of the N W fractional Qr of Sectn. 8 Town 40 Range 14 which the said Jones was seized of at the time of his death which sale was authorized by act of the Legislature of Illinois, Now if the said Paine shall well and truly apply the proceeds of said sale to the purposes mentioned in said act, then this Bond to be void and void, otherwise to remain in force

Witness

Franklin Newhall — Selth Paine (Seal)

Harrison Newhall (Seal)

Said Bond filed in this office is endorsed on the back

"Filed July 5th 1847

Wm D Ogden

P S Peace

State of Illinois }
Cook County } ss

[1224-39]

I Charles B Farwell, Clerk of the County Court in and for said County do hereby certify that the foregoing is a true and correct transcript of the Records of proceedings and of the Papers on file in this office relating to the estate of David L W Jones Deceased and after a careful examination of the records and files I am unable to find any other orders or papers relating to said estate in my said office

In testimony whereof I have hereunto set my hand and affixed the official Seal of the said County Court of Cook County at my office in Chicago this twenty fourth day of March A D 1854

Charles B Farwell
Clerk of the County Court

State of Illinois }
County Cook } S S

I Walter Kimball Clerk of the Cook County Court of Common Pleas within & for the County & State aforesaid do hereby certify that the foregoing contains a full true and correct transcript of all papers and also of the judgment of the court in the case of Timothy R Young and Margarette E Young against Gideon W Davenport now on file in my office and further that the interlining on page six of the foregoing transcript between the third and sixth lines was made by me & before the sealing hereof

In testimony whereof I have

L 12214-HD

hereunto set my hand and the
seal of said court at the city
of Chicago in said county this
19th day of September A.D. 1854
Walter Kimball
Clerk

Transferred by consent from Ottawa

Gideon W Davenport
appellant
vs
Timothy B Young
and
Margaretta His wife

Supreme Court of
the State of Illinois

Appeale from
Cook County

And now at this day comes
the said appellant by Damien Williams
his Attorney, and says that in the record
and proceedings aforesaid and in the giving
of the judgment aforesaid, there is manifest
error in this to wit;

First. The court erred in finding
the issue and giving judgment for the
plaintiff in the court below

Second. That the Court erred in excluding
evidence on the part of the defendant in the
court below, that at the time of the sale of
the property in question by Seth Paine all
the personal estate of Dorr had been applied
to the payment of his debts and that there
were debts against his estate at the time
of the sale.

5122140-41

Third

That the court erred in excluding evidence that the sale to Newhall was not in fact made or the contract and deed executed and delivered (although dated the day before) until after the bond required by the act had been executed and approved by the Probate Justice and filed in his office nor until after the consent of Mrs Paine had been in fact filed by and in said office of the Probate Justice

Fourth

That the court erred in ~~admitting~~ excluding evidence that Mrs Young was consulted about the sale at the time it was made and desired to have the property sold in conformity to and for the purposes mentioned in the law, and that at that time she was about sixteen years of age. Fifth,

The court erred in allowing the plaintiff below to read from and give in evidence the printed Journals of the Senate & House of representatives of Illinois for the Session beginning 7 Dec 1835, and in not excluding the same

Sixth

The court erred in not sustaining the title of the defendant below and giving judgment for him in the premises, And that the judgment is in other respect erroneous and the appellants pray that the same may be reversed. Maxwell Williams

Atty for appellants

[1281-92]

And now the said appellee come & say that in the
record and proceedings aforesaid there is no error, and
they therefore pray said judgt may be affirmed
By Trimble & Buckner
their Attys

It is hereby agreed that this record shall be filed in the office of the clerk of the Supreme court in the 2nd Division, to be held at Springfield, and that the same shall be agreed and determined at the present term of said court

Chicago, Jan 4th 1855
George Manierre
atty of debts

A True copy of record at my office
W B Warren Clk. S C
2d grand division

L 12214-H3

104

Gideon W. Davenport

vs

T. R. Young et al.

Record

Fds June 26. 1885.

L. Nelson Clk.

Chicago, Nov 17. 1855.

Hon Walter B. Scates
Mount Vernon.

Dear Sir,

I take the liberty of requesting you to have the cause of Young vs Davenport remanded for a new trial. By reference to the record you will find a Stipulation by which the right to a new trial is reserved to either party.

The reason for this will be obvious when I inform you that the declaration covers part of a tract of land not included in the Jones tract sold by Paine.

Very respectfully Yours

George Manierre.

[ID214-46]

17 Nov 1855

Judge Mancini
Request cause
to be remanded

Timothy R Young and
Margarette E. Young
— v —
H Newhall et al

In the Cook Common Pleas.
Ejectment for the recovery of the
E ½ N.W. Frac Qr Sec 28 T 40 N. R 14 E.

The plaintiff Margarette, intermarried with Timothy R Young, claims the land in Controversy, as heir of her father David L. W Jones, under a grant from the United States to said Jones. The defendants claim under a sale made by Seth Paine administrator debonis non of said Jones, made in pursuance of a special act of the Illinois Legislature, entitled, "An act to authorize the sale of the real estate of D. L. W Jones deceased and for other purposes" (approved in force by virtue of Constitution) though not approved by council of revision Dec 6. 1836. (Vide Laws of 1836-7 page 159) This act, confers power upon the administrator of Jones, without naming him, to sell at public or private sale the real estate of Jones in Illinois & Michigan and apply the proceeds to the liquidation of the debts of said decedent, and the residue to be invested in some productive real property or public securities under the advice and with the consent of the judge of Probate of Cook Co. for the use and benefit of the widow & child of the deceased in the proportion severally due them according to the laws in such cases. The act further provides that the administrator previously to making the sale, shall give bond in such penalty and with such surety as shall be prescribed by said judge of probate conditioned for the faithful performance of the trust & with such other conditions

[12814-H9]

as said judge may deem necessary for the effectual security of the said widow and heirs; and it was further provided that no sale should be made until the widow's written consent to the sale should be filed in the probate office.

The power thus conferred was executed on July 5. 1847. almost 10 years after the passage of the act above recited

James Whitlock was administrator of Jones when the act passed. The sale was made by Seth Paine administrator de bonis non.

The widow of Jones intermarried with Seth Paine the admr after the passage of the act and was covert when her consent was given.

Her consent is dated July 3. 1847. but never was actually marked filed. It is alledged to have been filed July 6 1847 and a nunc pro tunc order so declaring was entered by the Probate court Dec 20. 1848. The order and recital of the time of filing the consent, show that both were entered & filed after Sale was made

A nunc pro tunc order of the Probate Court was entered Dec 20 1848 approving Paine's bond and surety, and reciting the filing of that bond but no approval on July 5. 1847 the very day of Sale.

Mahlon D Ogden was judge of probate on July 5. 1847 but neither his official [illegible]

any action of his in relation to the Consent or bond. The same pro tunc orders were entered by Thomas Doyne his successor.

The grant of administration to Whitlock was revoked on April 13. 1837 on the suggestion of Allen Paine & swipe that he had removed from the County and refused to proceed with the settlement of the estate. No notice to Whitlock appears of record.

The bond of Paine was payable to the People of the State of Illinois

The Sale was a private one.

It was a contract to sell dated July 5. 1847.

The Sale was to Newhall the surety of Paine.

The Sale was on a credit of 1. 2. & 3 years.

The deed made in pursuance of the contract bears date August 5. 1851. nearly 15 years after the power was conferred.

The statute gave no power to convey but simply to sell.

No debts were ever proved and allowed by the Probate Court.

The debts of Jones had all been paid before the sale.

The proceeds of the Sale were never invested by Paine with the assent of the Probate Court or otherwise.

Such was the law, and such are the facts.

[13214-48]

We insist that the Sale under which the defendants claim their title is illegal and void

1. Because the act of the Legislature directing the sale was not a legitimate exercise of Legislative power. and
2. Conceding the law to be valid, its provisions were not complied with by the administrators either in letter or Spirit.

Firish. The act was repugnant to the Constitution for Several reasons.

1. It dissejed Mrs Young of her freehold without the judgment of her peers or "the Law of the land"

   Vide Old Constitution A 8 Sec 8.

We by presuin "Law of the Land" meant when first used in Magna Charta

1 A general public law operating alike upon every citizen, and enforced by the intervention of judicial and executive powers, So that every department of government Should concur in depriving the citizen of his life, liberty and property.

2 The common Law and acts of parliament amendatory thereof as contradistinguished from the Civil Law which the Norman Kings

were endeavoring to fasten upon the People of England.

This proposition is fully sustained by the authorities. In the language of Webster "By the law of the land, is most clearly intended the general laws, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society"

Dalmouth College v Woodward 4 Whea R

Brown v Hammel 6 Barn R 87.

Taylor v Porter 4 Hill R 146.

Kinney v Beverly 4 Hen & Munf R 336.

Reed v Wright 2 Green Iowa R 22–24.

Vanzant v Waddell 2 Yerger R 270. Cited in my note book 4 p 12.

Ervine's appeal 16 Barr R 20 Note book 4 p 20.

Arrowsmith v Burlingame 4 M'Lean 498.

White v White 5 Barbour R 481–3.

Bank of Columbia v Oakey 4 Whea R 235

2 Kent 13. 3 Story Const Dec. 264. & 661.

It means a law as defined by Blackstone and Demosthenes. 1 B Com 44 & note

It clearly does not mean the Common Law in our constitutions, else the power of the Legislature to amend its defects must be denied

[13214-49]

It does not mean judicial proceedings according to the course of the common law for this would be a denial of power to the legislature

1. Abolish old and substitute new forms of action
2. To establish codes of procedure and regulate the practice and pleadings of courts.
3. To change the rules of evidence
4. To establish summary modes of proceeding against sheriffs and tax collectors
5. To sell lands for the non payment of taxes
6. ~~and lastly change the remedies~~ ~~remedies~~.

~~It is conceded~~

6. To authorize attachments of estates for debt
7. To prescribe a constructive notice
8. To authorize proceedings vs unknown persons
9. And lastly it would deny to the legislature all power over remedies.

It does not mean trial by jury for that is secured by another provision

This position is sustained by the ordinance of 1787. which provides

1. For trial by jury
2. For judicial proceedings according to the course of the common law.

3. That no man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land.

Ordinance 1787. A 2.

Why these several provisions if they all mean the same thing?

Judgment of his peers or the law of the land are not synonymous terms

Judgment of his peers means. a trial by his equals

1 The King had no peers – therefore not liable at all. This the ground upon which the regicides were condemned for the trial and judgment of Charles I.

2 A peer of the realm – could only be tried by the house of Lords.

3. A breach of privilege was tried by the Commons The contumacious member could not be tried elsewhere – nor relieved on habeas Corpus.

4. A private citizen was tried by a jury of the vicinage.

5 A freeman was tried by a jury half of which was composed of his own countrymen.

6 A parish &c liable only before an ecclesiastical body of his peers.

This principle is recognized in our impeachments

Law of the land means a general law.

It means this or it is a dead letter.

[12214-50]

Ample provision is made to secure life liberty and property under the old constitution – if the clause in question is thus construed.

Here are the guarantees of life and liberty

1 Life and liberty are declared inherent & indefeazable rights A 8 Sec 1.

By implication they may be forfeited for crime A 6 Sec 1. A 8 Sec 13.

2 Ex post facto laws prohibited A 8 Sec 16.

3 An indictment is essential as the foundation of a prosecution A 8 Sec 10.

4 The right of trial by jury is preserved and the jury declared judges of the law & fact. A 8 Sec 6. 9. & 23.

5 Secret trials prohibited A 8 Sec 9.

6. A Speedy trial guaranteed A 8 Sec 9.

7 The citizen cannot be compelled to accuse himself A 8 Sec 9.

8 He has a right A 8 Sec 9

1 To be heard by himself & Counsel

2 To Compel attendence of witnesses

3 To confront his accusers.

4 To demand the cause & nature of the accusation

9. Remedy for malicious arrests, imprisonments & prosecutions are given him A 8 Sec 12

10 The writ of Habeas Corpus is preserved A 8 Sec 13.

11 unreasonable searches & seizures of his
his person are forbidden. A 8 sec 7.
12 general warrants against his person denied
A 8 sec 7.
13 The penalty is to be proportioned to the
Offence A 8 sec. 14.
14. He shall not be transported A 8 sec 17.
15 He shall not be put in jeopardy the
second time A 8 sec 11.
16 may apply for a pardon A 3 sec 5.

Such are the specific guarantees in favour of life and liberty what then is meant by the clause that no person shall be deprived of his life & liberty but by "the law of the land"?

It must mean that it is to be effected under general laws, after a judicial trial &c.

Such is the decision of the supreme court of Tennessee.

Budd v State (3) Humph R 483.

The property of the Citizen is guaranteed in equally strong terms by specific provisions of the constitution.

1 The right of acquiring possessing & protecting
is declared an inherent & indefeasable
right A 8 sec 1.
2. The People shall be secure in their houses,
papers & possessions from unreasonable
seizures A 8 sec 7.

[12214-51]

3 General warrants to search suspected places are prohibited A8 sec 7.

4. Property shall not be taken for public use
1 without the consent of the general assembly
2 without making the owner just compensation
A8 sec 11.

5. The Owner is secured against unequal assessments
A8 sec. 20.

6. The obligation of contracts are preserved A8 sec 16.

7. Forfeitures for crime prohibited A8 sec 16.

8 No conviction shall work corruption of blood
by which the due course of descent shall
be interrupted A8 sec 16.

9 A remedy for the violation of his rights of
property is secured. A8. sec 12.

Such are the guarantees in favour of private property
What then does the clause mean which says
that ~~the~~ he shall not be dessesd &c. by by
the law of the land.?

It means the general laws or nothing

A forfeiture under the general laws. &
a judicial condemnation when consistent with
State necessity

State necessity dispenses with judicial power
in sale of land for taxes

But the only cases where the general laws
permit a transfer of another's property is
1. Sales under judgments

2 condemnation for public uses

3. Sale of intestate lands.

4 Sale of an infants lands.

In all these cases the judicial power intervenes and general laws define them & prescribe the mode of proceeding.

It may therefore be safely affirmed that under our government property cannot be divested except where each department of government concurs

1 The leg - prescribe a general rule.

2 The judiciary ascertain the fact & render judgment

3 The judgment is enforced by executive power.

Therefore any law which is partial in its operations, and intended to affect particular individuals alone, or to deprive them of the benefits of the general laws, is unwarranted by the constitution & void

Vanzant v Waddell 2 Yerger 269. 4 Note book 13.

Examples

1. Suspension of statute of limitations in favour of a particular person.

Holden v James 11 Mass R 396

2. Union Bank felony case

Budd v The state 3 Humph R. 483.

3. That Geo Smith may lend money @ 20 p/c

or pay only 1 p/c damages on a protested bill &c.

Let these principles be applied to the law in question

[12214-52]

On the death of Jones the land in controversy descended to Mrs Young his sole heir.

She thus acquired by the operation of a general law a vested estate in the land.

She took it of course subject to the debts of her father, which were a lien upon the estate.

But the mode of enforcing that lien was prescribed by the same general law which ~~created~~ vested the estate in her & conferred a lien in favour of the creditors

This special act attempts to deprive her of that vested estate in a manner different from the general law.

The general law then in force required the intervention of the judicial power to divest the title of Mrs Young.

Under that general law the admr had power to sell only

1 When debts existed

2 When personalty insufficient to pay them

These facts must have existed and been judicially ascertained

1 On petition by the admr to the circuit court

2 On notice to her & appointment of a guardian ad litem to defend her rights

3 A regular trial & judgment

& sale by public vendue.

Under the general law a public sale was after due notice

ordered and Completion thus encouraged.

And lastly Only so much of the debtor's estate could be sold under the general laws as was necessary to pay the debts.

This Special act departs from the general laws in many important particulars.

1 No notice is given to the heir

2 no hearing before the Legislature

3 no ascertainment of debts

4 no evidence of insufficiency of personalty

5 A private sale is permitted.

6 The admr is not named the admr for the time being may do it. Thus the security of personal confidence in the agent is wanting

7 The Whole of the lands are to be sold, whether necessary or not.

8. No notice is to be given Mrs Young of the proceedings before probate Court, so that she can appear and protect her rights

9. no notice of the time terms & place of sale is required

10. The power is entirely discretionary with the administration for the time being.

The Dubois act 1819 p 115. which is similar both have equitable held void

Dubois v M'Lean 4 M'Lean 486

The Robinson act, which ascertained the debts held void Private acts (82) p

Lane v Dorman 3 Scam 238.

[12014-53]

Jones v Perry 10 Yeates 59 merely in points - debts not ascertained - but assumed there was debts

The opposing cases are doubtful affirmancies of the power of the legislature.

To condemn without notice is a tyranical exercise of power.

Even parliament, omnipotent as it claims to be interfere with no estate, without notice to all parties in interest. 2 Bl Com 344-6.

2. The Special act violates the distributive powers of the government — which confers legislative power upon one department judicial power upon another, and executive power to upon the third — and prohibits each from exercising any power properly belonging to the other

Art 1. sec 1 & 2.

The seperation of these powers Constitutes the only security to life liberty and property.

The blending of them together is essence of tyranny itself.

As long as they remain seperate, each department operates as a check upon the others.

When united in the hands of one — no paper constitutions can restrain it from the exercise of any conceivable power.

The legislature has always been regarded as the encroaching power of the government.

It should never be permitted to pass the limits assigned to it by the constitution

It is the duty of the judiciary to arrest them when they attempt it.

The power to order a sale of lands to pay debts is undoubtedly a judicial power.

[12214-34]

The insufficiency of the personal estate, and the existence of debts is the foundation of the power to sell.

These facts must be ascertained before the power to sell arises.

Else you take the property of one & give to another.

Now in this case the legislature in the enactment of this law either had proof of these facts. Or assumed their existence without evidence.

In either case, whether they found the facts or presumed them and thereupon ordered the sale, they exercised thus a judicial power.

The fact that it was ex parte &

Men judgments on arbitrary ones renders them ~~each~~ so much the more obnoxious

In order to render it an exercise of judicial power. It is not necessary that they should ascertain the precise amount of the debts due.

It is sufficient to know that they determined that debts were due.

If they only found one cent due this is sufficient

It differs only in degree & not in principle.

This is the doctrine in Jones v Perry. If it is insisted that the land was ordered to be sold in order to re-invest in more productive securities for the benefit of the heir, the case is in no better position. The application was not made by the heir or guardian, but by the administrator. By the general law he had no control over the land, that power was vested in the guardian.

2. The necessity of the sale must be ascertained and this involves again judicial power.

3. The act in question was unpaired the obligations of a contract.

The grant by the U.S. was to Jones & his heirs forever and assigns forever.

The legislature recognized the validity of this contract by declaring in effect that if Jones died without conveying the land or disposing of it by will, it should descend to his heir at law.

[12214-65]

the instant that Jones died, by virtue of the grant & law, the estate vested in Mrs Young.

It is true she took the land charged with the debts of her father.

But two conditions were attached to the rights of the creditors.

1 The personalty should be insufficient to pay them &

2 They must have proved up their claims before the probate court in 2 years from the grant of administration

The power of the administrator depended upon these 2 facts.

And he must exercise it in 5 years after his grant.

Else his power was barred.

All of these things were to be ascertained judicially after notice to Mrs Young.

Such was the contract

It is expressly violated in several important particulars.

No debts were ever proved up.
No evidence that personalty insufficient
No judicial proceedings intervened
No public sale took place.

She had a vested in the surplus — a power
Sale left none. In this the contract was
enlarged

Again the power was not exercised for
15 years after Innes' death.

The lien of the creditors was gone.

When rights once vest under a law —
it is regarded as a contract. &
a repeal of the law cannot divest
the rights. Smith 384-5.

That conditions attached by law to the
right of acquisition by descents formed
a part of the contract there can be
no doubt.

Additional burdens were by this law
enforced upon these heirs

1 A lien is given to the creditor where none
existed before

2 The real estate is made the primary fund

3 The remedy of the heir to contest the
sale is taken away.

[1RB14-56]

Smith 387 – 396.

Her strong right of trial by jury is violated

" And she is deprived of the right of appeal.

4. The special act is a retrospective law affecting a previously vested right and therefore void

At the time of the passage of the act, the bar of the creditors was gone.

The act revives it.

Their claims were barred by the Statute.

The bar is removed by this act.

Smith 289. – 296. 534. 537. 540 Sec 375

5. The law in question takes the land from Mrs Young the owner — and gives it to the purchaser at the Sale of the administrator.

She was already discharged of the lien & power of Sale.

The legislature revive them both.
Taylor v. Porter 4 Hill 144.

Secondly If however the law in question can be reconciled consistently with the Constitution.

We insist that its requirements have not been complied with.

1. The ~~man~~ ach must be construed as requiring notice to Mrs Young of the proceedings before the Probate court

1 That she might contest the debts
2 Show that Mrs Paine never assented
3 That she might object to the Surety
4 That she might insist upon proper conditions in the bond.
5. That she might have a voice in the investments
6. That she might contest the validity of the Sale.

[12214-57]

notice is of the essence of things required to be done.

No judicial proceeding is valid unless the party has had an opportunity of defending

This is a principle of universal natural justice

And when a statute directs such a proceeding and is silent as to notice, Courts will construe the law so as to require it to be given

Holloday v Swails 15 Conn 515

Chase v Nathaway 14 Mass R 222 insane case

Dwaris 767-8.

The notice not having been given in this case the acts of the probate Court, and those acting under its orders are nullities.

2 The law is to be construed as conferring power to sell only for the purpose of paying such debts as had been proved against the estate

The land was bound for such debts only.

The power to sell under the general law depended upon the existence of such debts

No debts were ever proved against the estate
They had all been paid by Whitlock
and Paine.

They never proved up the amount of
their advances. as debts against the estate
Therefore in this case there was no
power to sell.

Doman v Lane 1 Gelm R 143

Doman v Post 13 Md R 127.

3. The law is to be construed as requiring
a sale of the land, only in the event
of a deficiency of personal assets.

There is no evidence here that such was
the case.

The Sale is void for this reason.

Otherwise the act is a violation of the
vested interests of the heir.

Because according to the law in force
when the descent was cast, the personalty
was the primary fund for the payment
of the debts of the ancestor.

But this law makes the real estate first
chargeable.

$12214-58

4. There is no evidence that Mrs Paine the widow of Jones ever gave her consent to the sale before it took place.

1 There was no proof before the probate court that the instrument filed ~~in~~ the Probate office was a consent executed by Mrs. ~~Howard~~ Paine. According to the principles of the common law her execution of that document ought to have been proved before its filing and adoption by the court.

This cannot be presumed in a case like this.

2. The legislature contemplated the free and voluntary consent of the widow of Jones. After the passage of the act she intermarried with Paine the administrator and the presumption is that she acted in obedience to the command and coercion of her husband, and not voluntarily, when she gave her consent.

Our whole jurisprudence relative to married women is founded upon this presumption.

3. Her consent though dated July 3 1847 was not filed in the Probate office until July 6. 1847. the day after the sale which took

place July 5. 1847.

The statute is imperative that no sale shall take place until her Consent is filed.

The filing of it - is a condition precedent.

4. The nunc. pro tunc order is a nullity for several reasons.

1. There was nothing appearing of record or upon the files or minutes of the court to base the order upon.

2. The duties of the Probate judge in relation to the sale were purely ministerial, and not judicial. Such an officer has no power to correct his errors & omissions by the entry of nunc. pro tunc orders

3. If judicial, his power was special and confined by a special law. He was only quo ad hoc a judge and his powers ceased with the performance of the act. If erroneous, his power being functus officio he could not correct his proceedings 18 months afterwards.

4. No inferior and special tribunal has power to enter up an order nunc pro tunc

[1221H-59]

5. Admitting the power – it cannot be exercised by the successor of the judge before whom the proceedings took place.

6. The proceeding being a special one, whereby the estate of Mrs Young was to be divested under a special Statute, made against her will & without notice – the validity of the execution of the power is to be tested by the record and files of the court at the time the proceedings took place, if invalid then, they could not be cured by a nunc pro tunc order.

7 The ~~notice~~ order is void because Mrs Young had no notice of the time & place when and where the nunc pro tunc order would be applied for. Such an order is a nullity.

Bybee v Ashby 2 Gilm R. 151
11 Illinois R.

8. The order thus entered recites a consent filed on the 6th of July 1847 the day after the sale. It is void for this reason.

The Sale is void for want of a legal Consent.
And incapable of confirmation. 9 Shea 541. Cord 482
Whenever the Consent of a third person is required
to precede the execution of a power. — the execu
tion of the power is void, unless the Consent is
given. Hankins v Kemp 3 Esch 410
Sugden on Powers 263
Crawford

Especially is this the case in reference to naked
Statute powers, conferred under Special Statutes,
and which seek to divest the estates of strangers.

5th There is no legal and sufficient
evidence tending to the establishment
of the fact, that the probate judge
prescribed the condition, ~~as~~ fixed
the penalty and approved the
Security on the bond, which the
law required to be given; nor
that the bond was filed before
the Sale.

There is no evidence on the files or of record
in the Probate Court showing the fact.

The nunc pro tunc orders are nullities

[13214-65]

for the reasons assigned under the point relating to the consent of the widow.

This was a condition precedent to the validity of the sale.

In powers of this character every requisition of the law having the semblance of benefit to those interested in its exercise must be punctiliously complied with, or no title can be acquired under them.

It has been held that a tax sale is void, where the collector neglected to give bond in compliance with the Statute before proceeding to collect the tax. In such case the bond is intended to secure the payment of the revenues collected and not for the benefit of the owner of the estate. Yet the omission to give one was held fatal to the sale, merely because the Statute required one to be given.

In this case the bond was intended to secure the creditors, and the investment of the surplus for the benefit of Mrs Young. She had a direct interest in its execution & filing

[12214-61]

The true principles of construction all establish the correctness of the foregoing positions

1. A Statute shall never have an equitable construction to overthrow an estate.

Dwaris on Statutes 729.

2. A power derogatory to private property must be construed strictly and not enlarged by intendments Dwaris Stat. 750.

3. Private acts of Parliament, conferring new & extraordinary powers of a special nature upon particular persons affecting the property of individuals, shall receive a strict interpretation. Dwaris 750.

4. The best interpretation of a Statute is to construe it as near to the rule & reason of the common law as may be, and by the course which that law observes in similar cases. Dwaris 695.

5. The words of a statute ought not to be expounded to destroy natural justice

Dwaris 726.

6. Where a Statute requires a thing to be done in a particular way, that way alone can be pursued.

Com'rs of the Poor v Davis 3 Brevard R 396.

Andover &c v Gould 6 Mass R

Franklin Glass Co v White 14 Mass R 286

[12814-62]

Stinger v State 1 Black R 39.
Janney v State 1 Ills R 428.
Reddick v Governor 1 Ills R 147.
State v Cole 2 McLeod R 117

7. Where rights are infringed, where fundamental principles are overthrown, and where the general system of the laws is departed from, the legislative intention must be expressed with unequivocal clearness, to induce a court of justice to presume that such consequences were intended
Cranch R.

8. Where a special power, is conferred by Statute, over the property of individuals, the requisitions of the law must be strictly pursued, and appear to be so on the face of the proceedings.
Smith v Hileman 15 Conn.

The same rules are applied to all powers
Hawkins v Kemp 3 East R. 410

[12814-63]

6. The power in this case was conferred upon the then existing administration James Whitlock although he is not named in the act, and not upon Seth Paine and consequently the execution of it is void.

Whitlock must have petitioned for the passage of the act:

If petitioned for by a stranger the act is void.

The legislature must have reposed a personal confidence in him and for this reason granted the power.

He was the father of Mrs Paine and the grandfather of Mrs Young. The one a widow, the other an infant.

It is not to be presumed that the legislature intended to confer so great a power upon a stranger to those who were to be affected by its exercise.

Otherwise we are to intend that Confidence did not enter into the legislative mind in the granting of this power.

His fiduciary designation was as certain a mode of ascertaining the person intended as if the grant had been to James A Whitlock

S[2214-6]

by name.

Farran v Austmouth 5 Green R. 345.

Wallbock takes as trustee and as admr.

Conklin v Edgerton 21 Wend 445

Hall v Irwin 2 Gilm 176.

A trust cannot exist unless it has a repository

2 Gilm 182

The person restoring it must know him or when the trust is restored 2 Gilm 182.

The administrator had no power to sell in this case under the general.

Authority cannot be delegated

Lyon v Jerome 26 Wend R 485.

~~by name.~~

~~[illegible] [illegible]~~

Now it is a well settled principle, that where a statute gives authority to one person to do an act, all others are excluded, upon the principle that a special power is ever to be strictly pursued.

Dwarris 767. 11 Rep 59. 64. Foster Case

A power by will to sell, but no executor named cannot be executed by an adm'r with the will annexed. Hall v Norris 2 Gilm R.

Conklin v Edgerton. 21 Wend R.

7 The power in question was extinguished and barred by lapse of time before its execution.

Jones died in 183~~4~~ in Aug

~~the law was passed~~

Administration was granted to Whitlock on the 15 day of Dec'r 1835

The act conferring the power was passed on at the extra session of 1835-6 but took effect Dec'r 6 - 1836 ~~Dec 6. 1836~~

The power was executed July 5 1847 & August. 5. 1851. Sale on former day - deed on latter

It will thus be seen that before power was execute

years had elapsed since the death of Jones

years since the grant of administration
years since the creation of the power.

Now 5 years are allowed from the date of administration to make a final settlement

The same number of years is fixed by the law of escheats to enforce the title of the State where there is no heir a devisee "and such estate shall not have been sold according to law, within 5 years after the death of the person last seized, for the payment of the debts of the deceased".

RS. 225. sec. 2.

This is the limitation fixed by the Supreme Court of this and other States for the making of an application to sell land to pay debts by an administrator

Norman v Lane 1 Gilman R.

And the same period has been established for the execution of a statute power of this character

Dubois v McLean 4 McLean R

[12214-67]

Some limitation is essential in cases of this kind, and we are forced to resort to analogies

What better analogy can be resorted to than that fixed by the general laws of the land.

The debts of all creditors were barred by the general limitation laws.

They were barred by the Statute regulating claims against intestate estates.

The took no steps to enforce their debts against the estate.

They are presumed to have been paid or the heir against the land abandoned or waived.

Some reasonable time should be fixed when the heir may take the possession of the estate, and enjoy it without the fear of being deprived of it by dormant liens & levies.

It is no answer to say that the heir never entered & took possession.

[12214-47]

during all this time She was an infant
She is not chargable with laches.
She had a reasonable time after coming of
age to bring her ~~claim~~ action or
make her entry.

8. The revocation of the grant of
administration to James Whitlock
was a nullity.

The Causes alledged were insufficient
R L 1833 p 1835 & 35 sec 69 & 70
The revocation was without notice to Whitlock
ibid.
And it was done without evidence on
a mere suggestion of Panic & Curse.

If the revocation was illegal Whitlock
remained administrator, and the exercise
of his powers by Panic conferred no
title ~~to~~ upon the defendants.

9. The Sale itself was illegal because
made in private instead of
publicly.

It has already been shown the general laws
should have been followed.

A public Sale by reason of competition would
would have been more advantageous to all concerned

[12214-68]

One object of the law was to pay the debts another to invest the surplus for the widow & heir

A private sale was calculated to defeat both.

10 The Sale was void because no notice was given of the time place & terms of Sale.

The general law should have been followed in this respect also.

The interest of all parties required it.

Its Omission renders the Sale illegal.

11. The Sale is void because Credit was given

1 The terms of the law when fairly construed contemplated a Cash Sale.

1 The debts were of long standing and ought to have been promptly paid

2. The residue if any was to be invested for the benefit of the heir & widow. If a cash Sale. the principle would have been better secured, and the interest annually paid

3. The Condition of the bond was simply to invest not to first collect & then invest.

2. It is a general rule that a special power to Sell does not authorize a Sale upon Credit

[12214-69]

Illinois v Delafield 8 Paige R 526.

Maine R

Even a Commercial agent can only sell on credit when such sales are sustained by usage.

12. The bond to maintain the residue if any never was executed. This renders sale void

It does not appear whether there was a surplus
The presumption is that there was
The purchaser was bound to see to the proper application of the residuum
He claims under a special power
And purchases at his peril.
Conditions precedent & subsequent must be performed
He must look to it that they are.

13. Paine had no power to convey.

A power to sell does not imply a power to convey.

Nor does a power to convey imply a power to warrant

These principles are well settled.

14. The credit was too long
& the necessary security not
taken.

Statute rules 6 to 12 months
bond & personal security &
Mortgage on estate
R L 1833 p 645 sec 101

14. No Inventory, appraisements &
Sale bill ever filed by either
administrator. R L 1833 p 645 sec 102

This fatal if the course of the general law is
to be taken.

They must be of record R L 1833 p 634 sec 66

15. The bond illegal

1. Payable to People for use of widow & heirs
2. The condition not in conformity with Statute.

For the provisions of the general law see L 1833 p 644 — 7.

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~~Brief~~

~~Prescott, A Young et al~~

"

~~H A Worthall et al~~

Davenport

104. vs }

Young et al

Brief of R

S Blackwell

Filed July 9. 1857

L. Leland Clk.

Davenport
vs
Young et al

The office of Admr is not transmitted when a new one is appointed - the successor is in the same office and in the same right, with all the powers and duties annexed to it and all of them fill but one the same office

In contemplation of law the office survives, because it may be filled by appointment. ~~Not so with office of Executor.~~

Not so the office of Executor: that dies with the last executor, and tho' the Executor of an Executor may be the representative of the first testator, still that does not make him Executor.

By examining Hargraves note in 1 Coke Litt. 113 a, and the cases cited in my brief, (10 Peters &c) the court will observe that the principle of the rule is, that the Power survives with the office, and that the reason why the Admr or the Executor of an Executor cannot execute a power given to the Executor is simply because he is not Executor, — that office not surviving.

~~But~~ The nature of the duty is not the subject of inquiry where the duty is officiae — annexed to the office: for whatever the duty, if it be made officiae as it is where imposed upon the Office, then it

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is capable of survivorship with the office the same as if for the purp. of debts.

There is nothing in the nature of the Power which is not capable of being annexed to the office of Admr — the only inquiry is, is it annexed to the office. If it is then it survives with it.

1 Sug. on Pow. 143. 4.

Now is it possible for this Court to hold that the office of Admr does not survive, because the first Admr is removed? — That the second Admr is not in the same office and does not answer to the designation of Administrator of the Estate; — and that a power annexed to the office may not be executed by him?

If so, then the Admr de bonis non has no power under the Stat, to obtain an order to sell for purp. of debts, because that power is bestowed on the Administrator alone and that too without naming the Admr de bonis non.

Now, is not the true ground and principle, this, that in contemplation of law all the ~~officers~~ persons who may succeed each other in any office are in one and the same office; — that that survives with all its powers & duties, — and that the last is as completely and fully invested with them as the first.

If so with what propriety can it be said that a power annexed to the office cannot be executed except by him who was in that office when the power was annexed? —

It seems to me that the whole fallacy of the contrary argument lies in supposing that there has been a transmission of the office and not a continued existence of the office.

Though one Adm^r is not answerable to another for the malperformance of his duty, this does not vary the principle. Neither is any officer ~~succeeding another~~ liable to his successor for malfeasance. Though there is no privity between the persons succeeding each other in office for such purpose, yet they are nevertheless in the same office, — the office is the same because it survives and may be made perpetual.

There is no case to be found (that I know of) exactly similar to this; but it seems to me that it is settled by principle.

All that is asked of the Court, is, to decide, "that a power annexed to an office "in itself capable of survivorship, may be "executed by any person holding the office." This is the very language of Hargraves note which is now the law. (10 Peters. 1 Sug. on Pow 143.4)

George Marcus
for Appellant

[1224-72]

On this point see my brief further.

Note.

But on looking at the books I find that the Executor of an executor may execute a power created by the will, — in other words that a power may be even transmitted. This therefore, establishes the principle of transmission.

(somewhere between 133 & 145.)
1 Sug. on Powers ~~[illegible]~~
Powell on Devises 198.9.
21 Vesey. 448. ~~[illegible]~~
16 Vesey 45. 6.

But I think the true ground in this case, is, that the power survives with the office — & that the office is not transmitted in any legal sense.

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