

No. 14011

# Supreme Court of Illinois

King

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vs.

Wade et al

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17011  
IN SUPREME COURT,

DECEMBER TERM, 1852

January

HEIRS OF W. KING, APPELLANTS,  
vs.  
WADE AND OTHERS, APPELLEES. } Decree of Morgan.

The record in this case shows the following facts:

In January, 1851, Nicholas King filed his Bill in Chancery in Morgan Circuit Court, against the personal representatives and heirs of William King and Joseph King, (two deceased brothers,) stating "that in the year 1829 he was a resident of Yorkshire, old England, and his brothers, William King and Joseph King, were residents of said State of Illinois, that during that year, he and his said brothers entered into partnership for the purpose of dealing in real estate, and their capital so to be employed was one thousand pounds sterling money, or \$4,840 money of the United States, that said capital was placed in the hands of said William, or William and Joseph King for that purpose in the following proportions: three-fifths to the use of said Nicholas, one-fifth to the use of said Joseph King, and one-fifth to the use of said William King.

That afterwards the following lands, in the counties of Morgan and Scott, in the State of Illinois; were purchased by said Nicholas, out of said capital, and the titles in fee made to him, (here the lands are described,) having cost \$2,507 35. The proportion of said Nicholas in said £1000 was \$2,904 00.

His proportion of aforesaid investment \$1,504 41; due him, after said investment, \$1,399 59. The proportion of said William King in said £1000, was \$968 00. His proportion of said investment, \$501 47; due him, after said investment, \$466 53." Joseph King's proportion and investment being the same.

"The aforesaid lands, at the dates of the purchases of the same, were partly improved, and partly wild lands; the said William King took possession and control of the same, and until the sale of a portion of the same as hereinafter stated, and until his death as hereinafter stated, of the remaining portion of said lands, improved and rented, or occupied the same, paid the taxes, &c., but never kept any specific account in the premises of his disbursements and receipts."

He here sets out certain sales of parts of the land purchased, alleging the amount of sales to have been \$3,995 67, and claiming three-fifths thereof.

"On the 27th of June, 1843, the said William King being on a visit to old England, at Pickering, Yorkshire, a memorandum in writing was made and signed by him and your orator in the words and figures following:

~~Memorandum: Whereas, in and about the purchase of the property which I, Nicholas King, bought in the State of Illinois, U. S., and which is now held by my brothers, Joseph King and William King, under power of attorney given by me, the sum of one thousand pounds was expended, that is to say six hundred pounds by me, and two hundred pounds by each of my brothers, Joseph and William, this is to certify that we, Joseph King, William King and Nicholas King, do now hold the whole of said lands and properties, together with their proceeds, whether by sale or otherwise, in the proportion of the above sums respectively, and each agrees to account to the others for any of money or other portions of the above property they may have received, or may hereafter receive."~~

The bill then states that Joseph King, after having executed his last will and testament, departed this life in 1842. That by said will John Peter and William King were appointed executors, and testamentary guardians for his children, Mary Ann Rhoda, who had been married to William Wade, Joseph N. King, and William W. King. The bill then states "that in the years 1845 and 1846, the said William King, by the application of the sum of \$3,000, more or less, of the capital trust and partnership funds, or in trust for your orator to the extent of an undivided three-fifths, become the purchaser of the title in fee simple to the following lands in the county of Clayton and State of Iowa." (Here the lands are described, and their cost stated.)

The bill then states that William King died in 1846, having executed his last will and testament. That John C. Hamilton Administrator, with the will annexed of William King, had obtained a judgment against him on a note given to said Wm. King, that Robert Cultas had also obtained a judgment, both of which operated as liens upon the lands in Morgan and Scott. That the lands remaining unsold in Morgan and Scott had been sold by agreement of parties in interest, and proceeds to which complainant was entitled, applied to the payment of the judgments above referred to, and one-fifth thereof paid over to each of the estates of William and Joseph King.

The heirs and personal representatives of Joseph King and William King are next described and named, and made parties. The bill asks that they may be required to answer on oath &c." The said John C. Hamilton and William Thomas are specifically called upon to exhibit a full and accurate description of any lands in the county of Clayton and State of Iowa, of which said William King died seized in fee simple, of whom he purchased the same?—when?—with what funds?—at what cost? and whether or not in trust for your orator, and to his use to the extent of three-fifths? They are also called upon to state specifically, whether or not the funds derived as aforesaid, from sales of land to the said Jacob Strawn and John Richardson, (to whom parts of the lands in Morgan and Scott have been sold by William King.) were not applied to the purchase of said lands in said county and State; or elsewhere?"

The bill then prays that a special commissioner be appointed and required, "to state a full, just and true account between the parties in interest in this case, according to their relative and respective rights and responsibilities in the premises to take and report all the evidence that the said parties may give, or adduce in the premises, and if on such liquidation and adjustment of accounts, any

balance may be due to your orator in the premises, he prays your honor to grant him a final decree for the payment of the same; or if it should appear from the evidence that may be reported in this cause, that your orator is entitled to have conveyed to him an undivided three-fifths of the Iowa land, he prays your honor on the final hearing of this cause, to decree a proper and apt conveyance in the premises, and for such other and further relief as your orator may be entitled to, according to the structure and equity of his cause, &c."

To the foregoing bill, the present complainants, Wade and wife, made no answer or defense. The complainants, Joseph N. and William W. King, answered by their guardians *ad litem*;—no answer was filed by the testamentary guardians.

The answer of Joseph N. King and William W. King by their guardians, is in substance "they have no personal information in relation to the matters and things stated in the bill. They refer to the answer of the other infant defendants as containing all the facts and suggestions in relation to the rights of the parties as far as known.

~~These defendants suppose that upon a settlement of the accounts between their fathers, Joseph King and the said Nicholas King, something will be found to be due from said Nicholas, but they do not know that that settlement can have any necessary connection with this suit."~~

The representatives of William King, by their answer, contested and denied the right of Nicholas King to any part of the Iowa lands. They denied also that said lands were purchased with partnership or trust funds

Upon the foregoing allegations, the cause was heard, and decided by the Circuit and Supreme Courts, and upon the return of the cause to the Circuit Court—the master in chancery made and stated an account as stated in the bill—and for the change in the account as first made, assigns the following reasons.

"I further report to the court that in the examination of the testimony in the cause, upon which the foregoing report, and my former reports were made, no inquiry was had or made in relation to any settlement of the accounts between the estates of William King and Joseph King, there being no allegations in the pleadings as between said estates on which such testimony was deemed proper. It is now shown to me however, that a settlement of the accounts between said estates was made subsequent the death of Joseph King, and from the nature of that settlement, (a memorandum of which is hereto annexed,) and the position of the parties, it is fair to presume that William King's estate has fully accounted to the estate of Joseph King for all that the latter estate is entitled to; so that William King ought to be held to have received the money from Wesley Waggoner and interest amounting to \$731 40, which I have in the foregoing report charged to the representatives of Joseph King, and the representatives of William King, are therefore in account with Nicholas King to be charged with that amount in addition to the sum I have above stated to be due from him to them. Taking the settlement of accounts between the estates of William King and Joseph King, to be a full adjustment of accounts between them, the representatives of the latter would have no claim to any interest in the lands in Iowa.

This statement of accounts by the Master shows the following results :

No. 1.	The copartnership Dr. to N. King.....	\$2,294 08
	Cr. By rents received.....	776 38
	Balance due N. King.....	\$1,517 70
No. 2.	Representatives of W. King to the Copartnerships, Dr. For cash and rents received.....	\$9,330 40
	Cr. For Disbursements.....	4,369 77
	Balance.....	\$5,178 63
No. 3.	Representatives of Joseph King to the Copartnership. Cash from Waggoner for Land.....	\$ 400 00
	Interest to 25th October 1855.....	331 40
	Balance.....	\$ 731 40
Indebtedness of parties respectively resulting from the foregoing statement:		
The representatives of William are indebted to Nicholas—		
	For one-fifth of \$1,517 70 ballance of account, No. 1.....	\$ 303 54
	For three-fifths of \$5,178 63, ballance of account, No. 2.....	3,107 18
	Being in all.....	\$ 3,410 72
To which Nicholas is entitled, from the Representatives of William, in addition to a conveyance of three-fifths of the Iowa Lands. The representatives of Joseph King are indebted to Nicholas—		
	For one-fifth of \$1,517 70 ballance of account No. 1.....	\$ 303 54
	For three-fifths of \$731 40 ballance of account No. 3.....	438 84
	Total.....	\$ 742 38

To which Nicholas is entitled from Representatives of Joseph.

Upon the Report of the Master, the Court entered the following decree: "On this 17th October, 1855, came the complainant by his solicitor, David A. Smith, and the defendants by their solicitor, W. Thomas. The complainant, by his solicitor, produced and filed the opinion of the Supreme Court of this State, Second Grand Decision, and certificate of reversal of the decree that was rendered in

this cause on the 25th of October, 1854, as also a third statement of account in this cause, by James Berdan, Esq., special master in this case, made in conformity with the said opinion of the Supreme Court, and to which account, as stated, no exception was taken, and which is therefore approved by the Court. From this account it appears, that the Representatives of the estate of William King are indebted to the complainant in the sum of \$4,153 10 cents. It is ordered, adjudged and decreed by the Court that the complainant have, receive and recover from the estate of said deceased, said sum of money to be paid in due course of Administration &c.;" and then proceeds: "The Supreme Court having so decided, it is further ordered, adjudged and decreed by the Court, that the complainant is, as tenant in common, entitled in fee simple to an undivided three-fifths of the lands in the State of Iowa. (Here the lands are described.) The Court then after stating the reasons, proceeds to decree a sale of the said Iowa land—and thus proceeds: "The surplus monies as realized from time to time, to be paid to the parties in this cause, as follows: To the complainant, or his proper representative, three-fifths, and to the representatives of the estate of William King, deceased, the other two-fifths, the interest on one-third of said two-fifths to be paid to said Rachael King for life, in lieu of dower. —And saving and reserving to the representatives of the estate of Joseph King, deceased, as between them and the representatives of the estate of William King, deceased, the right to show that they, the representatives of said Joseph King, deceased, are entitled to the net proceeds of the sales of one-fifth of said lands."

Under this decree the Iowa lands were sold in June, 1856.

On the 11th June, 1857, the representatives of Joseph King, Mary A. Wade and others commenced this suit, claiming the one-fifth of the net proceeds of the sale. Upon a hearing of the cause, before the Circuit Court, the bill was dismissed; and upon appeal to the Supreme Court, January term, 1858, this decree dismissing the bill was reversed, upon the ground of the exclusion of depositions taken in the case of Nicholas King. The abstract then furnished the Court by the complainants is copied in 1942 JL 301

and is here referred to, to show their version of the contents of the record. The defendant, Thomas, not being satisfied with the abstract so furnished, in respect to the defense and the facts relied on by the answers, filed the following statement:

The abstract of the plaintiffs in error, with reference to the final decree of Morgan Circuit Court—the proceedings under that decree—and of the bill now bearing the Court is sufficiently full for all the purposes of this suit—but the facts relied on by the answer are not so stated—the following part of said answer is therefore copied.

The said Thomas, in answer to that part of the bill charging fraud, says "that in the spring of 1852, John Peter, executor of Joseph King, visited Jacksonville for the purpose of seeing John C. Hamilton, administrator of William King, and of closing a settlement between the estates. Said Hamilton being absent, said Peter called on the defendant with a view to said settlement, he being the guardian for the children of said William King, and attorney for said Hamilton, said Peter presented a statement of an account, which the defendant then believed, and still believes, was in the hand-writing of M. Link, Esq., Judge of the Green County Court, with a balance against the estate of William King of probably \$100, and stated that said Hamilton, as Administrator, held a note of him, the said Peter, given to William King, which he wanted to obtain in satisfaction of said balance; the defendant could not make any settlement, but took the account, and promised upon the return of Mr. Hamilton to have the matter adjusted. Upon subsequently seeing said Hamilton, the note of Peter was obtained, the amount of which, when credited, exceeded the amount of balance of accounts as presented, \$4 79; this defendant then, from the account so presented to him, made the statement of account above referred to by the complainant, including in the credit of payment to "John Peter, surviving executor," the amount of his note, whatever it was, he then sent the account presented to him, the note of said Peter, and the account so made by him, to the said Peter, and the account as made out, was returned to him receipted as it now appears, with the \$4 79. This defendant believed at the time of the transaction, that a settlement had been made of the accounts of the two estates, before and by the Judge of the Green County Court, which had been made a matter of record in said Court, and that the Judge had stated the result, simply to enable the said Peter to obtain the balance. He did not know but that said charge of \$2,281 10, was the footing of a long account, and in fact such was his impression at the time. When the master in chancery had made a statement of the accounts in October, 1855, in the suit of Nicholas King, aforesaid, this defendant did, acting as the guardian and attorney for the heirs of William King, insist before said master, that as no inquiry had been made in regard the accounts between the estates of Joseph and William King, it would be wrong to report any balance as between said estates, and he presented to said master the statement and receipt aforesaid, as evidence that settlements had been made between said estates, and urged that as a reason why no balance should be reported. The said Thomas, was of opinion, that upon the pleadings in the case, and evidence taken, no decree could rightfully or legally be entered as between the estates of Joseph and William King, and that if the children of Joseph King were entitled to anything, they would not be barred or precluded from asserting their right whenever they might think proper to do so. The said Thomas also urged as a reason against reporting as between said estates, that said children of Joseph King had not asserted any claim in the suit, although they had arrived at mature age, and were fully advised in regard to said suit, and of all the matters in controversy therein. The said Thomas further states, that he had been informed, and he believed the fact so to be, that said Joseph N. King and William W. King had both stated, that they did not believe that said Nicholas King was entitled to any part of the lands in Iowa, and as for themselves, they should never set up any claim, as they knew that their uncle William had purchased said lands for his own use, and not for uncle Nicholas and them; and this defendant may have stated this information to said master in chancery. Upon the statements and suggestions made to said master,

and the further statement by this defendant, that the balance found due from the estate of Joseph King to Nicholas King might be charged against the estate of William King, the said master in chancery changed the report so as to make it as it now appears.

The said defendant also conversed with the solicitor of Nicholas King, and made known to him what change he desired in the report, and the reasons therefor, and this defendant is sure that said solicitor concurred with him in opinion, that the case was not in a situation to have the accounts between the two estates finally settled by decree. This defendant is certain that neither the master in chancery, or himself, or the solicitor of Nicholas King, intended any wrong or fraud in respect to the rights of complainants, nor did any one of them believe that said complainants would be concluded by the said report, or any decree that might be entered thereon."

The foregoing statement of the records shows the questions before the Court when the decree was entered, in October, 1855, and first; that the present complainants or plaintiffs in error, had not, at the date of said decree, set up, or asserted any claim to any part of the Iowa lands, or the proceeds thereof, and that no questions were made in respect to any such claims. Second: That the Court did not, nor could not, rightfully make any decree barring or concluding the said parties in respect to their right to a part of said Iowa lands.

The undersigned now contend, that the Circuit Court decided correctly in the case now before the court.

1. The record was properly excluded, because the questions decided by the Court were not the same as those involved in the present case.

2. The said suit, (the record of which was excluded.) was prosecuted, and the testimony therein taken for one purpose, and the present suit is for another.

3. The record shows, that the opinion of the Supreme Court, relied on, was predicted in part upon the testimony of Rachel King, widow of William King, who was, and is, an incompetent witness in the case.

4. The proceedings before the master in chancery, and his action in the case, could, not, under any state of pleadings, be evidence, until confirmed or approved by the Court—but if they could, then the whole must be taken together, and his report shows that complainants have no rights.

5. The right of plaintiffs in error to a decree depended on proof, that they, as the heirs of Joseph King, were entitled to one-fifth of the Iowa lands, and the record offered in evidence, did not prove, or tend to prove this fact, but on the contrary, so far as it proved any thing in the case, proved that they were not so entitled.

LOGAN & LINCOLN.

At the October term, 1858, the cause was again heard before the Circuit Court—and decree entered in favor of complainants, from which this appeal is prosecuted. Upon that hearing, the record shows that the defendants objected to the reading of the record of the suit of Nicholas King against the representatives of William King, as evidence.

First, because the matters in controversy in said suit were different and between different parties, and the object of the suit was different from those in the present suit.

Second, because by the laws of the land the said Record is not competent evidence.

Third, because the decree in said cause was predicated in part, upon the testimony of Rachael King widow of William King, who is an incompetent witness in the present suit.

Fourth, because the said record, if used as evidence, prove nothing as between the parties to the present suit, in respect to the points in controversy.

Fifth, because the depositions of said suit were not taken with reference to the matters in controversy in this suit, nor for the purpose of settling any question as between the estates of Joseph King and William King.

The depositions of Rachael King objected to, because she was the widow of William King, and was therefore incompetent to testify. The Record also shows that all of these objections were overruled except in respect to the deposition of Rachael King—and that the parties agreed, that upon the hearing of this cause before the Supreme Court at January term, 1859, the record on file in that court, should be used as far as applicable, so as to save necessity of obtaining another copy.

Upon enquiry during the term of the court, the record referred to could not be found—application was then made to the Clerk of the Circuit Court for another copy, and it was then ascertained that the depositions taken in the case of Nicholas King against the heirs of Wm. and Joseph King composing a part of the record, and to which the objections applied, could not be found, and further, that those depositions were not on file in October, 1858, where the decree now complained of was renewed.

The case being thus situated, Mr. Smith, for Wade and others, agreed before this court, that the depositions referred to were not on file at the time the decree was entered, and that they could not now be found; that defendant, Thomas, was not present when the decree was entered, but had, before the entry thereof, given written directions in regard to it, supposing that the depositions were on file. It was then agreed that the cause should be heard upon the record as it was, unless the depositions could be found, in which case they were to be used, upon this understanding which it is believed was entered on the record, or on the docket of the Chief Justice. Mr. Smith argued the cause for defendants—the errors assigned are—

First, The Court erred in permitting the record of the suit of Nicholas King against the heirs of William and Joseph King to be used as evidence in the cause.

Second, The Court erred in permitting the Report of the master in Chancery, made and filed in the case of Nicholas King against John C. Hamilton, administrator, and the heirs of W. & J. King, to be used as evidence in the cause, and also in permitting the decree in said case to be used as evidence in said cause.

Third, The Court erred in entering a decree in favor of the complainants for any part of the proceeds of the Iowa lands, there being no testimony proving that any of the money of the said complainants was ever used in purchasing said lands.

Fourth, The Court erred in decreeing anything due the complainants and not dismissing the bill. The present Record contains:—

1. The Bill in Chancery. *page 1 to 19*
2. The Master's Third Report. *21 to 26*
3. The account receipted by Peters, referred to in the bill and Master's report. *26*
4. The decree of N. King, of October, 1855. *27 to 32*
5. The agreement of Kings as to their interest in the lands purchased in name of N. King. *32*
6. The Will of Joseph King. *33*
7. The sums in chancery. *37*
8. Answer of John Peter. *38 to 41*
9. Answer of G. C. King, jr. and others. *43 to 51*
10. Decree of October, 1858, and exceptions. *61 to 64.*
11. Replications to answers. *55*
12. Deposition of John Peter. *55 to 58*
13. Deposition of Berdan. *58 to 60.*
14. The Bill filed by N. King. *67. & Master's Report of 14 Decr 1853.*

The Record as now presented to the Court, and upon which the case must be decided, does not contain any of the testimony or depositions taken in the case of N. King against the Representatives of William and Joseph King, for the exclusion of which evidence the decree of the Circuit Court was reversed at the last term of this Court.

The Appellants contend—

First, That by the decree of October, 1855, the rights of all the parties, to that suit, were settled, and that said parties are concluded, in respect to all questions so far as dependant on that suit, then adjudicated by the court; errors in that decree, in respect to law or facts, can only be corrected by the Supreme Court. The saving or reservation in the decree, places the complainants in the same position that they would have occupied if no suit had been brought, or decree entered. I. Greenleaf, p. 596, note 2, p. 593. See 528, *Gilston vs. Codwire & Johnson*, chancery 193. *Jones vs. Smith* 13 Ill. R. 304. *Cody vs. Hough* 20 Ill. R. 115

Second, That no one of the parties can go into an enquiry as to the reasons on which the Court acted in making the decree, nor can they show, that upon the facts before the Court, the decree should have been different, except upon errors alleged before the Supreme Court. *Buckmaster vs. Ryder* 12 Ill. R. 211. *Ferguson vs. Ferguson* 19 Ill. R. 79.

Third, But for the reservation or saving of the rights of the complainants in this cause, they would have no other remedy than by appeal or writ of error. By that reservation their right to sue for, and recover the one-fifth, if entitled to it, is fully protected. *Buckmaster vs. Ryder* 12 Ill. R. 211.

Fourth, Acting upon the correctness of the foregoing propositions, the complainants have filed this bill, asserting their right to one-fifth of the Iowa lands, or the proceeds of the sale thereof. And the only question presented is, have they any right to said lands?

They charge that they are entitled to the said one-fifth because of the investment of their funds to that extent in its purchase, and this is the only ground on which they can rightfully or legally assert their claim. This charge is positively denied by the answers, and the record furnishes no evidence of its truth. Upon this view of the case, there can be no pretense of right to recover. But the complainants seek a recovery upon the ground that, by the opinion of the Supreme Court in the case of N. King, (16 Illinois Reports 190) they are entitled to a recovery, and they insist that this opinion of the court is binding and conclusive in the premises. Although the record offered in evidence (not including the depositions,) would be received, to prove itself, and prove what was decided or decreed, yet not to prove that the funds of complainants or their ancestor, were invested in the purchase of the lands, nor that complainants are entitled to one-fifth of the proceeds of the sale. The final decree, which settled the rights of the parties in that suit, proves that they were not so entitled. And the decree was inadmissible as evidence, for any other purpose than as above stated, if for no other reason because it was obtained upon the testimony in part of Rachael King, who was an incompetent witness. Joseph King died in 1843; the Iowa land was purchased in 1846.

The appellants contend further—

First, That whatever might have been the duty of the Court, or whatever might have been the rights of the parties under the opinion of this Court, as reported in 16th Ill. 190, when that opinion was filed, the decree entered in October, 1855, concludes and binds the parties to that suit, (and, as before stated, the complainants acting upon this view of the law, have filed this bill, with a view to show they are entitled to the net proceeds of the sale of one-fifth of the lands, and this they do after the sale, and after it is known that the one-fifth exceeds the amount of indebtedness of Joseph King to Nicholas King.)

Second, That to entitle the complainants to a decree in this cause, they must prove that their money, or that of their ancestor was used in purchasing said land.

Third, The written or printed opinion of the Supreme Court, predicated upon evidence not now before the Court, cannot be allowed to stand in the place of the evidence, nor to supply evidence sustaining the decree. It is the final judgment or decree in a cause which binds and concludes. I. Greenleaf p. 523-4 Sec. 528-9.

Fourth, The record of the cause, if evidence against must be evidence for the Appellants, and this proves that complainants are not entitled to any relief. I Greenleaf Sec. 528-9. 2 Starkin side page 221.

5. As the complainants have made their case, and as it now stands before the court, they have no right to recover unless the evidence, sustains their claim—they are not concluded by the record, because of the reservation,—but the record as it is, disproves their right to recover, and they must rely upon other evidence.

6. The opinion and judgment of the Supreme Court of the January Term 1859, settles the question that the despositions regularly taken in the case of Nicholas King, are evidence in this case, but it is not decided or intimated that the record or decree or the report of the master in chancery are admissible.

7. But assuming that the report of the master in chancery, is admissible as evidence, the court will see by looking at that report, that Joseph King had received his full proportion of the proceeds of all the sales of the Morgan county lands, at the time of the purchase of the Iowa lands, and that his heirs had no money in the hands of William King at the time he made these purchases, nor at any time afterwards.

The appellants contend as follows:

1. That this court cannot, in this proceeding inquire into, or change the decree entered in October 1855. Upon proof of the allegation that the land was purchased with their money they may recover, but they cannot in this proceeding reverse or change that decree.

2. That whatever may have been the proper remedy of the complainants or the proper mode of proceeding to enforce that remedy,—are questions not now before the court, they have filed their bill, as they had the right to do, asserting their right to one-fifth of the land in controversy upon the ground of the investment of their funds, and the court cannot aid them without proof of such investment.

3. The questions now presented, are not, what this, or that court may have said, or even decided in regard to complainants rights, upon a given, or supposed state of facts, but what are their rights upon the facts now before the court.

4. The appellants have heretofore and still do, contend, that upon the pleadings in the case of Nicholas King, no questions was presented, or could be decided in respect to the land, except as to the right of three-fifths thereof. It was no where alleged, that Joseph King's heirs had any interest in that land. They claimed no interest.

5. The court cannot decide this case for complainants except upon one of two grounds,

1. That it is competent for a party to file a bill in chancery to correct a former decree by showing, that the court acted erroneously, or upon a supposed state of facts which did not exist.

2. That complainants rights have not been adjudicated, the first presents a question of law, and the last a question of fact, as to whether funds of Joseph King or his heirs were used in the purchase.

As this case was presented at the last term, it was expected, that the court would decide the questions, as to the admissibility and effect of the decree of October 1855 as evidence, and that if the decision was, that the complainant could in this form of proceeding obtain a reversal, or change of that decree, the question would then arise upon the testimony whether or not as matter of fact, the allegation of the investment of complainants funds in the Iowa lands had been proven, but the court, thinking, most probably, that the circuit court should first pass upon the testimony, confined its opinion to the simple point of admissibility. That question being determined, it now remains for the court to decide the other. It was believed and contended, that upon the facts then before the court, the complainant had no right to recover.

In the view of the counsel, the complainants and their case, stand precisely in the position which they would have occupied, if no decree had ever been made in favor of Nicholas King, nor no suit brought of him, they claim one-fifth of the Iowa lands, upon the ground of the investment of their funds in its purchase, their right is contested, and the facts charged are denied, to recover, they must sustain by evidence, the truth of this allegation.

The charges of fraud against the guardian and attorney of W. King's children, in obtaining the decree of 1855, is not only answered, but disproved by the admitted facts in the record. Nothing was done, or intended to be done, to prevent the complainants from showing their right to one-fifth of the lands in controversy, whenever they might think proper to do so.

They have, by the advice of counsel, brought this suit, and no attempt has been made to use the decree obtained to their prejudice.

LOGAN & LINCOLN, For Appellants.

*The Record in this case was made out under the direction and supervision of Mr Smith and at the time of printing the foregoing Abstract and Brief, I supposed, every thing had been copied, which Mr Smith believed, should be incorporated in the Record; but since the printing Mr Smith has informed me, that he regarded a Report made by the master in the case of Nicholas King*

and filed on the 14th December 1853 as part  
of the Record, and that as such, he referred  
to it in his argument last winter.  
I did not hear the argument, or I should  
then have insisted, that the Report could  
not be used as evidence, and that it was  
in fact no part of the Record.

That the questions and the case may be  
settled, the Report is attached to the  
Record, marked "Nicholas King vs.  
John C. Hamilton & others" "Master Report"  
"Filed 14th December 1853"

The Report is not specifically referred to  
in the pleadings, nor in any decree,  
or opinions of the court, and unless  
excepted to by exceptions, does not form  
part of the Record. It could not be used  
as evidence in the case now before the  
court, because it does not contain  
nor purport to contain the testimony  
of witnesses, but simply the conclusions  
of the master from testimony not now  
before the court. If a decree had been  
made upon the Report, such decree  
would be evidence for some purposes  
but the Report would not for any  
other than to prove itself. —

for Appellants.

# IN SUPREME COURT,

~~DECEMBER TERM, 1858.~~

*January Term 1859.*

HEIRS OF W. KING, APPELLANTS,  
vs.  
WADE AND OTHERS, APPELLEES. } Decree of Morgan.

The record in this case shows the following facts:

In January, 1851, Nicholas King filed his Bill in Chancery in Morgan Circuit Court, against the personal representatives and heirs of William King and Joseph King, (two deceased brothers,) stating "that in the year 1829 he was a resident of Yorkshire, old England, and his brothers, William King and Joseph King, were residents of said State of Illinois, that during that year, he and his said brothers entered into partnership for the purpose of dealing in real estate, and their capital so to be employed was one thousand pounds sterling money, or \$4,840 money of the United States, that said capital was placed in the hands of said William, or William and Joseph King for that purpose in the following proportions: three-fifths to the use of said Nicholas, one-fifth to the use of said Joseph King, and one-fifth to the use of said William King.

That afterwards the following lands, in the counties of Morgan and Scott, in the State of Illinois; were purchased by said Nicholas, out of said capital, and the titles in fee made to him, (here the lands are described,) having cost \$2,507 35. The proportion of said Nicholas in said £1000 was \$2,904 00.

His proportion of aforesaid investment \$1,504 41; due him, after said investment, \$1,399 59. The proportion of said William King in said £1000, was \$968 00. His proportion of said investment, \$501 47; due him, after said investment, \$466 53." Joseph King's proportion and investment being the same.

"The aforesaid lands, at the dates of the purchases of the same, were partly improved, and partly wild lands; the said William King took possession and control of the same, and until the sale of a portion of the same as hereinafter stated, and until his death as hereinafter stated, of the remaining portion of said lands, improved and rented, or occupied the same, paid the taxes, &c., but never kept any specific account in the premises of his disbursements and receipts."

He here sets out certain sales of parts of the land purchased, alleging the amount of sales to have been \$3,995 67, and claiming three-fifths thereof.

"On the 27th of June, 1843, the said William King being on a visit to old England, at Pickering, Yorkshire, a memorandum in writing was made and signed by him and your orator in the words and figures following:

Memorandum: Whereas, in and about the purchase of the property which I, Nicholas King, bought in the State of Illinois, U. S., and which is now held by my brothers, Joseph King and William King, under power of attorney given by me, the sum of one thousand pounds was expended, that is to say six hundred pounds by me, and two hundred pounds by each of my brothers, Joseph and William, this is to certify that we, Joseph King, William King and Nicholas King, do now hold the whole of said lands and properties, together with their proceeds, whether by sale or otherwise, in the proportion of the above sums respectively, and each agrees to account to the others for any of money or other portions of the above property they may have received, or may hereafter receive."

The bill then states that Joseph King, after having executed his last will and testament, departed this life in 1843. That by said will John Peter and William King were appointed executors, and testamentary guardians for his children, Mary Ann Rhoda, who had been married to William Wade, Joseph N. King, and William W. King. The bill then states "that in the years 1845 and 1846, the said William King, by the application of the sum of \$3,000, more or less, of the capital trust and partnership funds, or in trust for your orator to the extent of an undivided three-fifths, become the purchaser of the title in fee simple to the following lands in the county of Clayton and State of Iowa." (Here the lands are described, and their cost stated.)

The bill then states that William King died in 1846, having executed his last will and testament. That John C. Hamilton Administrator, with the will annexed of William King, had obtained a judgment against him on a note given to said Wm. King, that Robert Cultas had also obtained a judgment, both of which operated as liens upon the lands in Morgan and Scott. That the lands remaining unsold in Morgan and Scott had been sold by agreement of parties in interest, and proceeds to which complainant was entitled, applied to the payment of the judgments above referred to, and one-fifth thereof paid over to each of the estates of William and Joseph King.

The heirs and personal representatives of Joseph King and William King are next described and named, and made parties. The bill asks that they may be required to answer on oath &c." The said John C. Hamilton and William Thomas are specifically called upon to exhibit a full and accurate description of any lands in the county of Clayton and State of Iowa, of which said William King died seized in fee simple, of whom he purchased the same?—when?—with what funds?—at what cost? and whether or not in trust for your orator, and to his use to the extent of three-fifths? They are also called upon to state specifically, whether or not the funds derived as aforesaid, from sales of land to the said Jacob Strawn and John Richardson, (to whom parts of the lands in Morgan and Scott have been sold by William King.) were not applied to the purchase of said lands in said county and State, or elsewhere?"

The bill then prays that a special commissioner be appointed and required, "to state a full, just and true account between the parties in interest in this case, according to their relative and respective rights and responsibilities in the premises to take and report all the evidence that the said parties may give, or adduce in the premises, and if on such liquidation and adjustment of accounts, any

balance may be due to your orator in the premises, he prays your honor to grant him a final decree for the payment of the same; or if it should appear from the evidence that may be reported in this cause, that your orator is entitled to have conveyed to him an undivided three-fifths of the Iowa land, he prays your honor on the final hearing of this cause, to decree a proper and apt conveyance in the premises, and for such other and further relief as your orator may be entitled to, according to the structure and equity of his cause, &c."

To the foregoing bill, the present complainants, Wade and wife, made no answer or defense. The complainants, Joseph N. and William W. King, answered by their guardians *ad litem*;—no answer was filed by the testamentary guardians.

The answer of Joseph N. King and William W. King by their guardians, is in substance "they have no personal information in relation to the matters and things stated in the bill. They refer to the answer of the other infant defendants as containing all the facts and suggestions in relation to the rights of the parties as far as known.

These defendants suppose that upon a settlement of the accounts between their fathers, Joseph King and the said Nicholas King, something will be found to be due from said Nicholas, but they do not know that that settlement can have any necessary connection with this suit."

The representatives of William King, by their answer, contested and denied the right of Nicholas King to any part of the Iowa lands. They denied also that said lands were purchased with partnership or trust funds

Upon the foregoing allegations, the cause was heard, and decided by the Circuit and Supreme Courts, and upon the return of the cause to the Circuit Court—the master in chancery made and stated an account as stated in the bill—and for the change in the account as first made, assigns the following reasons.

"I further report to the court that in the examination of the testimony in the cause, upon which the foregoing report, and my former reports were made, no inquiry was had or made in relation to any settlement of the accounts between the estates of William King and Joseph King, there being no allegations in the pleadings as between said estates on which such testimony was deemed proper. It is now shown to me however, that a settlement of the accounts between said estates was made subsequent the death of Joseph King, and from the nature of that settlement, (a memorandum of which is hereto annexed,) and the position of the parties, it is fair to presume that William King's estate has fully accounted to the estate of Joseph King for all that the latter estate is entitled to; so that William King ought to be held to have received the money from Wesley Waggoner and interest amounting to \$731 40, which I have in the foregoing report charged to the representatives of Joseph King, and the representatives of William King, are therefore in account with Nicholas King to be charged with that amount in addition to the sum I have above stated to be due from him to them. Taking the settlement of accounts between the estates of William King and Joseph King, to be a full adjustment of accounts between them, the representatives of the latter would have no claim to any interest in the lands in Iowa.

This statement of accounts by the Master shows the following results :

No. 1.	The copartnership Dr. to N. King.....	\$2,294 08
	Cr. By rents received.....	776 38
	Balance due N. King.....	\$1,517 70
No. 2.	Representatives of W. King to the Copartnerships, Dr. For cash and rents received.....	\$9,330 40
	Cr. For Disbursements.....	4,369 77
	Balance.....	\$5,178 63
No. 3.	Representatives of Joseph King to the Copartnership. Cash from Waggoner for Land.....	\$ 400 00
	Interest to 25th October 1855.....	331 40
	Balance.....	\$ 731 40
Indebtedness of parties respectively resulting from the foregoing statement:		
The representatives of William are indebted to Nicholas—		
	For one-fifth of \$1,517 70 ballance of account, No. 1.....	\$ 303 54
	For three-fifths of \$5,178 63, ballance of account, No. 2.....	3,107 18
	Being in all.....	\$ 3,410 72
To which Nicholas is entitled, from the Representatives of William, in addition to a conveyance of three-fifths of the Iowa Lands. The representatives of Joseph King are indebted to Nicholas—		
	For one-fifth of \$1,517 70 ballance of account No. 1.....	\$ 303 54
	For three-fifths of \$731 40 ballance of account No. 3.....	438 84
	Total.....	\$ 742 38
To which Nicholas is entitled from Representatives of Joseph.		

Upon the Report of the Master, the Court entered the following decree : "On this 17th October, 1855, came the complainant by his solicitor, David A. Smith, and the defendants by their solicitor, W. Thomas. The complainant, by his solicitor, produced and filed the opinion of the Supreme Court of this State, Second Grand Decision, and certificate of reversal of the decree that was rendered in

this cause on the 25th of October, 1854, as also a third statement of account in this cause, by James Berdan, Esq., special master in this case, made in conformity with the said opinion of the Supreme Court, and to which account, as stated, no exception was taken, and which is therefore approved by the Court. From this account it appears, that the Representatives of the estate of William King are indebted to the complainant in the sum of \$4,153 10 cents. It is ordered, adjudged and decreed by the Court that the complainant have, receive and recover from the estate of said deceased, said sum of money to be paid in due course of Administration &c.;" and then proceeds: "The Supreme Court having so decided, it is further ordered, adjudged and decreed by the Court, that the complainant is, as tenant in common, entitled in fee simple to an undivided three-fifths of the lands in the State of Iowa. (Here the lands are described.) The Court then after stating the reasons, proceeds to decree a sale of the said Iowa land—and thus proceeds: "The surplus monies as realized from time to time, to be paid to the parties in this cause, as follows: To the complainant, or his proper representative, three-fifths, and to the representatives of the estate of William King, deceased, the other two-fifths, the interest on one-third of said two-fifths to be paid to said Rachael King for life, in lieu of dower. And saving and reserving to the representatives of the estate of Joseph King, deceased, as between them and the representatives of the estate of William King, deceased, the right to show that they, the representatives of said Joseph King, deceased, are entitled to the net proceeds of the sales of one-fifth of said lands."

Under this decree the Iowa lands were sold in June, 1856.

On the 11th June, 1857, the representatives of Joseph King, Mary A. Wade and others commenced this suit, claiming the one-fifth of the net proceeds of the sale. Upon a hearing of the cause, before the Circuit Court, the bill was dismissed; and upon appeal to the Supreme Court, January term, 1858, this decree dismissing the bill was reversed, upon the ground of the exclusion of depositions taken in the case of Nicholas King. The abstract then furnished the Court by the complainants is copied in *19 Dec 12 301*.

and is here referred to, to show their version of the contents of the record. The defendant, Thomas, not being satisfied with the abstract so furnished, in respect to the defense and the facts relied on by the answers, filed the following statement:

The abstract of the plaintiffs in error, with reference to the final decree of Morgan Circuit Court—the proceedings under that decree—and of the bill now bearing the Court is sufficiently full for all the purposes of this suit—but the facts relied on by the answer are not so stated—the following part of said answer is therefore copied.

The said Thomas, in answer to that part of the bill charging fraud, says "that in the spring of 1852, John Peter, executor of Joseph King, visited Jacksonville for the purpose of seeing John C. Hamilton, administrator of William King, and of closing a settlement between the estates. Said Hamilton being absent, said Peter called on the defendant with a view to said settlement, he being the guardian for the children of said William King, and attorney for said Hamilton, said Peter presented a statement of an account, which the defendant then believed, and still believes, was in the hand-writing of M. Link, Esq., Judge of the Green County Court, with a balance against the estate of William King of probably \$100, and stated that said Hamilton, as Administrator, held a note of him, the said Peter, given to William King, which he wanted to obtain in satisfaction of said balance; the defendant could not make any settlement, but took the account, and promised upon the return of Mr. Hamilton to have the matter adjusted. Upon subsequently seeing said Hamilton, the note of Peter was obtained, the amount of which, when credited, exceeded the amount of balance of accounts as presented, \$4 79; this defendant then, from the account so presented to him, made the statement of account above referred to by the complainant, including in the credit of payment to "John Peter, surviving executor," the amount of his note, whatever it was, he then sent the account presented to him, the note of said Peter, and the account so made by him, to the said Peter, and the account as made out, was returned to him receipted as it now appears, with the \$4 79. This defendant believed at the time of the transaction, that a settlement had been made of the accounts of the two estates, before and by the Judge of the Green County Court, which had been made a matter of record in said Court, and that the Judge had stated the result, simply to enable the said Peter to obtain the balance. He did not know but that said charge of \$2,281 10, was the footing of a long account, and in fact such was his impression at the time. When the master in chancery had made a statement of the accounts in October, 1855, in the suit of Nicholas King, aforesaid, this defendant did, acting as the guardian and attorney for the heirs of William King, insist before said master, that as no inquiry had been made in regard the accounts between the estates of Joseph and William King, it would be wrong to report any balance as between said estates, and he presented to said master the statement and receipt aforesaid, as evidence that settlements had been made between said estates, and urged that as a reason why no balance should be reported. The said Thomas, was of opinion, that upon the pleadings in the case, and evidence taken, no decree could rightfully or legally be entered as between the estates of Joseph and William King, and that if the children of Joseph King were entitled to anything, they would not be barred or precluded from asserting their right whenever they might think proper to do so. The said Thomas also urged as a reason against reporting as between said estates, that said children of Joseph King had not asserted any claim in the suit, although they had arrived at mature age, and were fully advised in regard to said suit, and of all the matters in controversy therein. The said Thomas further states, that he had been informed, and he believed the fact so to be, that said Joseph N. King and William W. King had both stated, that they did not believe that said Nicholas King was entitled to any part of the lands in Iowa, and as for themselves, they should never set up any claim, as they knew that their uncle William had purchased said lands for his own use, and not for uncle Nicholas and them; and this defendant may have stated this information to said master in chancery. Upon the statements and suggestions made to said master,

and the further statement by this defendant, that the balance found due from the estate of Joseph King to Nicholas King might be charged against the estate of William King, the said master in chancery changed the report so as to make it as it now appears.

The said defendant also conversed with the solicitor of Nicholas King, and made known to him what change he desired in the report, and the reasons therefor, and this defendant is sure that said solicitor concurred with him in opinion, that the case was not in a situation to have the accounts between the two estates finally settled by decree. This defendant is certain that neither the master in chancery, or himself, or the solicitor of Nicholas King, intended any wrong or fraud in respect to the rights of complainants, nor did any one of them believe that said complainants would be concluded by the said report, or any decree that might be entered thereon."

The foregoing statement of the records shows the questions before the Court when the decree was entered, in October, 1855, and first; that the present complainants or plaintiffs in error, had not, at the date of said decree, set up, or asserted any claim to any part of the Iowa lands, or the proceeds thereof, and that no questions were made in respect to any such claims. Second: That the Court did not, nor could not, rightfully make any decree barring or concluding the said parties in respect to their right to a part of said Iowa lands.

The undersigned now contend, that the Circuit Court decided correctly in the case now before the court.

1. The record was properly excluded, because the questions decided by the Court were not the same as those involved in the present case.

2. The said suit, (the record of which was excluded.) was prosecuted, and the testimony therein taken for one purpose, and the present suit is for another.

3. The record shows, that the opinion of the Supreme Court, relied on, was predicated in part upon the testimony of Rachel King, widow of William King, who was, and is, an incompetent witness in the case.

4. The proceedings before the master in chancery, and his action in the case, could, not, under any state of pleadings, be evidence, until confirmed or approved by the Court—but if they could, then the whole must be taken together, and his report shows that complainants have no rights.

5. The right of plaintiffs in error to a decree depended on proof, that they, as the heirs of Joseph King, were entitled to one-fifth of the Iowa lands, and the record offered in evidence, did not prove, or tend to prove this fact, but on the contrary, so far as it proved any thing in the case, proved that they were not so entitled.

LOGAN & LINCOLN.

At the October term, 1858, the cause was again heard before the Circuit Court—and decree entered in favor of complainants, from which this appeal is prosecuted. Upon that hearing, the record shows that the defendants objected to the reading of the record of the suit of Nicholas King against the representatives of William King, as evidence.

First, because the matters in controversy in said suit were different and between different parties, and the object of the suit was different from those in the present suit.

Second, because by the laws of the land the said Record is not competent evidence.

Third, because the decree in said cause was predicated in part, upon the testimony of Rachael King widow of William King, who is an incompetent witness in the present suit.

Fourth, because the said record, if used as evidence, prove nothing as between the parties to the present suit, in respect to the points in controversy.

Fifth, because the depositions of said suit were not taken with reference to the matters in controversy in this suit, nor for the purpose of settling any question as between the estates of Joseph King and William King.

The depositions of Rachael King objected to, because she was the widow of William King, and was therefore incompetent to testify. The Record also shows that all of these objections were overruled except in respect to the deposition of Rachael King—and that the parties agreed, that upon the hearing of this cause before the Supreme Court at January term, 1859, the record on file in that court, should be used as far as applicable, so as to save necessity of obtaining another copy.

Upon enquiry during the term of the court, the record referred to could not be found—application was then made to the Clerk of the Circuit Court for another copy, and it was then ascertained that the depositions taken in the case of Nicholas King against the heirs of Wm. and Joseph King composing a part of the record, and to which the objections applied, could not be found, and further, that those depositions were not on file in October, 1858, where the decree now complained of was renewed.

The case being thus situated, Mr. Smith, for Wade and others, agreed before this court, that the depositions referred to were not on file at the time the decree was entered, and that they could not now be found; that defendant, Thomas, was not present when the decree was entered, but had, before the entry thereof, given written directions in regard to it, supposing that the depositions were on file. It was then agreed that the cause should be heard upon the record as it was, unless the depositions could be found, in which case they were to be used, upon this understanding which it is believed was entered on the record, or on the docket of the Chief Justice. Mr. Smith argued the cause for defendants—the errors assigned are—

First, The Court erred in permitting the record of the suit of Nicholas King against the heirs of William and Joseph King to be used as evidence in the cause.

Second, The Court erred in permitting the Report of the master in Chancery, made and filed in the case of Nicholas King against John C. Hamilton, administrator, and the heirs of W. & J. King, to be used as evidence in the cause, and also in permitting the decree in said case to be used as evidence in said cause.

Third, The Court erred in entering a decree in favor of the complainants for any part of the proceeds of the Iowa lands, there being no testimony proving that any of the money of the said complainants was ever used in purchasing said lands.

Fourth, The Court erred in decreeing anything due the complainants and not dismissing the bill.

The present Record contains:—

1. The Bill in Chancery. *page 1 to 19*
2. The Master's Third Report. *21 to 26*
3. The account received by Peters, referred to in the bill and Master's report. *26*
4. The decree of N. King, of October, 1855. *27 to 32*
5. The agreement of Kings as to their interest in the lands purchased in name of N. King. *32*
6. The Will of Joseph King. *33*
7. The sums in chancery. *37*
8. Answer of John Peter. *38 to 41*
9. Answer of G. C. King, jr. and others. *43 to 51*
10. Decree of October, 1858, and exceptions. *61 to 64.*
11. Replicatons to answers. *55*
12. Deposition of John Peter. *55 to 58*
13. Deposition of Berdan. *58 to 60*
14. The Bill filed by N. King. *67 & Masters Report of 14 Decr 1853*

The Record as now presented to the Court, and upon which the case must be decided, does not contain any of the testimony or depositions taken in the case of N. King against the Representatives of William and Joseph King, for the exclusion of which evidence the decree of the Circuit Court was reversed at the last term of this Court.

The Appellants contend—

First, That by the decree of October, 1855, the rights of all the parties, to that suit, were settled, and that said parties are concluded, in respect to all questions so far as dependant on that suit, then adjudicated by the court; errors in that decree, in respect to law or facts, can only be corrected by the Supreme Court. The saving or reservation in the decree, places the complainants in the same position that they would have occupied if no suit had been brought, or decree entered. I. Greenleaf, p. 596, note 2, p. 593. See 528, *Gilston vs. Codwire & Johnson*, chancery 193. *Jones vs. Smith* 13 Ill. R. 304. *Goody vs. Blumstein* 20 Ill. R. 45

Second, That no one of the parties can go into an enquiry as to the reasons on which the Court acted in making the decree, nor can they show, that upon the facts before the Court, the decree should have been different, except upon errors alleged before the Supreme Court. *Buckmaster vs. Ryder* 12 Ill. R. 211. *Hargrave vs. Hargrave* 19 Ill. R. 71.

Third, But for the reservation or saving of the rights of the complainants in this cause, they would have no other remedy than by appeal or writ of error. By that reservation their right to sue for, and recover the one-fifth, if entitled to it, is fully protected. *Buckmaster vs. Ryder* 12 Ill. R. 211.

Fourth, Acting upon the correctness of the foregoing propositions, the complainants have filed this bill, asserting their right to one-fifth of the Iowa lands, or the proceeds of the sale thereof. And the only question presented is, have they any right to said lands?

They charge that they are entitled to the said one-fifth because of the investment of their funds to that extent in its purchase, and this is the only ground on which they can rightfully or legally assert their claim. This charge is positively denied by the answers, and the record furnishes no evidence of its truth. Upon this view of the case, there can be no pretense of right to recover. But the complainants seek a recovery upon the ground that, by the opinion of the Supreme Court in the case of N. King, (16 Illinois Reports 190) they are entitled to a recovery, and they insist that this opinion of the court is binding and conclusive in the premises. Although the record offered in evidence (not including the depositions,) would be received, to prove itself, and prove what was decided or decreed, yet not to prove that the funds of complainants or their ancestor, were invested in the purchase of the lands, nor that complainants are entitled to one-fifth of the proceeds of the sale. The final decree, which settled the rights of the parties in that suit, proves that they were not so entitled. And the decree was inadmissible as evidence, for any other purpose than as above stated, if for no other reason because it was obtained upon the testimony in part of Rachael King, who was an incompetent witness. Joseph King died in 1843; the Iowa land was purchased in 1846.

The appellants contend further—

First, That whatever might have been the duty of the Court, or whatever might have been the rights of the parties under the opinion of this Court, as reported in 16th Ill. 190, when that opinion was filed, the decree entered in October, 1855, concludes and binds the parties to that suit, (and, as before stated, the complainants acting upon this view of the law, have filed this bill, with a view to show they are entitled to the net proceeds of the sale of one-fifth of the lands, and this they do after the sale, and after it is known that the one-fifth exceeds the amount of indebtedness of Joseph King to Nicholas King.)

Second, That to entitle the complainants to a decree in this cause, they must prove that their money, or that of their ancestor was used in purchasing said land.

Third, The written or printed opinion of the Supreme Court, predicated upon evidence not now before the Court, cannot be allowed to stand in the place of the evidence, nor to supply evidence sustaining the decree. It is the final judgment or decree in a cause which binds and concludes. I. Greenleaf p. 523-4 Sec. 528-9.

Fourth, The record of the cause, if evidence against must be evidence for the Appellants, and this proves that complainants are not entitled to any relief. I Greenleaf Sec. 528-9. 2 Starkin side page 221.

5. As the complainants have made their case, and as it now stands before the court, they have no right to recover unless the evidence, sustains their claim—they are not concluded by the record, because of the reservation,—but the record as it is, disproves their right to recover, and they must rely upon other evidence.

6. The opinion and judgment of the Supreme Court of the January Term 1859, settles the question that the despositions regularly taken in the case of Nicholas King, are evidence in this case, but it is not decided or intimated that the record or decree or the report of the master in chancery are admissible.

7. But assuming that the report of the master in chancery, is admissible as evidence, the court will see by looking at that report, that Joseph King had received his full proportion of the proceeds of all the sales of the Morgan county lands, at the time of the purchase of the Iowa lands, and that his heirs had no money in the hands of William King at the time he made these purchases, nor at any time afterwards.

The appellants contend further :

1. That this court cannot, in this proceeding inquire into, or change the decree entered in October 1855. Upon proof of the allegation that the land was purchased with their money they may recover, but they cannot in this proceeding reverse or change that decree.

2. That whatever may have been the proper remedy of the complainants or the proper mode of proceeding to enforce that remedy,—are questions not now before the court, they have filed their bill, as they had the right to do, asserting their right to one-fifth of the land in controversy upon the ground of the investment of their funds, and the court cannot aid them without proof of such investment.

3. The questions now presented, are not, what this, or that court may have said, or even decided in regard to complainants rights, upon a given, or supposed state of facts, but what are their rights upon the facts now before the court.

4. The appellants have heretofore and still do, contend, that upon the pleadings in the case of Nicholas King, no questions was presented, or could be decided in respect to the land, except as to the right of three-fifths thereof. It was nowhere alleged, that Joseph King's heirs had any interest in that land. They claimed no interest.

5. The court cannot decide this case for complainants except upon one of two grounds,

1. That it is competent for a party to file a bill in chancery to correct a former decree by showing, that the court acted erroneously, or upon a supposed state of facts which did not exist.

2. That complainants rights have not been adjudicated, the first presents a question of law, and the last a question of fact, as to whether funds of Joseph King or his heirs were used in the purchase.

At this case was presented at the last term, it was expected, that the court would decide the questions, as to the admissibility and effect of the decree of October 1855 as evidence, and that if the decision was, that the complainant could in this form of proceeding obtain a reversal, or change of that decree, the question would then arise upon the testimony whether or not as matter of fact, the allegation of the investment of complainants funds in the Iowa lands had been proven, but the court, thinking, most probably, that the circuit court should first pass upon the testimony, confined its opinion to the simple point of admissibility. That question being determined, it now remains for the court to decide the other. It was believed and contended, that upon the facts then before the court, the complainant had no right to recover.

In the view of the counsel, the complainants and their case, stand precisely in the position which they would have occupied, if no decree had ever been made in favor of Nicholas King, nor no suit brought of him, they claim one-fifth of the Iowa lands, upon the ground of the investment of their funds in its purchase, their right is contested, and the facts charged are denied, to recover, they must sustain by evidence, the truth of this allegation.

The charges of fraud against the guardian and attorney of W. King's children, in obtaining the decree of 1855, is not only answered, but disproved by the admitted facts in the record. Nothing was done, or intended to be done, to prevent the complainants from showing their right to one-fifth of the lands in controversy, whenever they might think proper to do so.

They have, by the advice of counsel, brought this suit, and no attempt has been made to use the decree obtained to their prejudice.

LOGAN & LINCOLN, For Appellants.

*The Record in this case was made out under the direction and supervision of Mr Smith and at the time of printing the foregoing Brief and abstract, I supposed any thing had been copied, which Mr Smith believed should be incorporated in the Record, but since the printing Mr Smith has informed me that he regarded a Report made by the Master in the case of Nicholas King*

and filed 14 December 1853 as part of the Record,  
and that as before, he refused to file his  
arguments with Winter, I did not know the  
arguments, or I should have then insisted,  
that the Report could not be used as  
evidence, and that it was in fact no  
part of the Record;

That the Questions, and case may be  
settled, the Report is attached to the Record,  
marked "Nicholas King vs John C Hamilton  
Advers So Masters Report, Filed 14<sup>th</sup>  
December 1853." The Report is not  
~~specifically~~ specifically referred to in the  
pleadings, nor in any decree or opinion  
of the Court, and unless made so by  
exceptions, does not form part of the  
Record, It could not be used as  
evidence in the case now before the  
Court, because it does not contain  
~~any reports to establish the testimony~~  
of witnesses, but simply the conclusions  
of the Masters from testimony not now  
before this Court; -

It is deemed that some evidence upon the  
Report, such as would be evidence  
for some purposes, but the Report  
would not for any other, than to  
show itself

W D Thomas  
for Appellants.

Dec 15 1857

King vs Wade

abu

# IN SUPREME COURT,

~~DECEMBER TERM, 1858.~~

*January Term 1859.*

HEIRS OF W. KING, APPELLANTS,  
VS.  
WADE AND OTHERS, APPELLEES. } Decree of Morgan.

The record in this case shows the following facts:

In January, 1851, Nicholas King filed his Bill in Chancery in Morgan Circuit Court, against the personal representatives and heirs of William King and Joseph King, (two deceased brothers,) stating "that in the year 1829 he was a resident of Yorkshire, old England, and his brothers, William King and Joseph King, were residents of said State of Illinois, that during that year, he and his said brothers entered into partnership for the purpose of dealing in real estate, and their capital so to be employed was one thousand pounds sterling money, or \$4,840 money of the United States, that said capital was placed in the hands of said William, or William and Joseph King for that purpose in the following proportions: three-fifths to the use of said Nicholas, one-fifth to the use of said Joseph King, and one-fifth to the use of said William King.

That afterwards the following lands, in the counties of Morgan and Scott, in the State of Illinois; were purchased by said Nicholas, out of said capital, and the titles in fee made to him, (here the lands are described,) having cost \$2,507 35. The proportion of said Nicholas in said £1000 was \$2,904 00.

His proportion of aforesaid investment \$1,504 41; due him, after said investment, \$1,399 59. The proportion of said William King in said £1000, was \$968 00. His proportion of said investment, \$501 47; due him, after said investment, \$466 53." Joseph King's proportion and investment being the same.

"The aforesaid lands, at the dates of the purchases of the same, were partly improved, and partly wild lands; the said William King took possession and control of the same, and until the sale of a portion of the same as hereinafter stated, and until his death as hereinafter stated, of the remaining portion of said lands, improved and rented, or occupied the same, paid the taxes, &c., but never kept any specific account in the premises of his disbursements and receipts."

He here sets out certain sales of parts of the land purchased, alleging the amount of sales to have been \$3,995 67, and claiming three-fifths thereof.

"On the 27th of June, 1843, the said William King being on a visit to old England, at Pickering, Yorkshire, a memorandum in writing was made and signed by him and your orator in the words and figures following:

Memorandum: Whereas, in and about the purchase of the property which I, Nicholas King, bought in the State of Illinois, U. S., and which is now held by my brothers, Joseph King and William King, under power of attorney given by me, the sum of one thousand pounds was expended, that is to say six hundred pounds by me, and two hundred pounds by each of my brothers, Joseph and William, this is to certify that we, Joseph King, William King and Nicholas King, do now hold the whole of said lands and properties, together with their proceeds, whether by sale or otherwise, in the proportion of the above sums respectively, and each agrees to account to the others for any of money or other portions of the above property they may have received, or may hereafter receive."

The bill then states that Joseph King, after having executed his last will and testament, departed this life in 1843. That by said will John Peter and William King were appointed executors, and testamentary guardians for his children, Mary Ann Rhoda, who had been married to William Wade, Joseph N. King, and William W. King. The bill then states "that in the years 1845 and 1846, the said William King, by the application of the sum of \$3,000, more or less, of the capital trust and partnership funds, or in trust for your orator to the extent of an undivided three-fifths, become the purchaser of the title in fee simple to the following lands in the county of Clayton and State of Iowa." (Here the lands are described, and their cost stated.)

The bill then states that William King died in 1846, having executed his last will and testament. That John C. Hamilton Administrator, with the will annexed of William King, had obtained a judgment against him on a note given to said Wm. King, that Robert Cultas had also obtained a judgment, both of which operated as liens upon the lands in Morgan and Scott. That the lands remaining unsold in Morgan and Scott had been sold by agreement of parties in interest, and proceeds to which complainant was entitled, applied to the payment of the judgments above referred to, and one-fifth thereof paid over to each of the estates of William and Joseph King.

The heirs and personal representatives of Joseph King and William King are next described and named, and made parties. The bill asks that they may be required to answer on oath &c." The said John C. Hamilton and William Thomas are specifically called upon to exhibit a full and accurate description of any lands in the county of Clayton and State of Iowa, of which said William King died seized in fee simple, of whom he purchased the same?—when?—with what funds?—at what cost? and whether or not in trust for your orator, and to his use to the extent of three-fifths? They are also called upon to state specifically, whether or not the funds derived as aforesaid, from sales of land to the said Jacob Strawn and John Richardson, (to whom parts of the lands in Morgan and Scott have been sold by William King) were not applied to the purchase of said lands in said county and State, or elsewhere?"

The bill then prays that a special commissioner be appointed and required, "to state a full, just and true account between the parties in interest in this case, according to their relative and respective rights and responsibilities in the premises to take and report all the evidence that the said parties may give, or adduce in the premises, and if on such liquidation and adjustment of accounts, any

balance may be due to your orator in the premises, he prays your honor to grant him a final decree for the payment of the same; or if it should appear from the evidence that may be reported in this cause, that your orator is entitled to have conveyed to him an undivided three-fifths of the Iowa land, he prays your honor on the final hearing of this cause, to decree a proper and apt conveyance in the premises, and for such other and further relief as your orator may be entitled to, according to the structure and equity of his cause, &c."

To the foregoing bill, the present complainants, Wade and wife, made no answer or defense. The complainants, Joseph N. and William W. King, answered by their guardians *ad litem*;—no answer was filed by the testamentary guardians.

The answer of Joseph N. King and William W. King by their guardians, is in substance "they have no personal information in relation to the matters and things stated in the bill. They refer to the answer of the other infant defendants as containing all the facts and suggestions in relation to the rights of the parties as far as known.

These defendants suppose that upon a settlement of the accounts between their fathers, Joseph King and the said Nicholas King, something will be found to be due from said Nicholas, but they do not know that that settlement can have any necessary connection with this suit."

The representatives of William King, by their answer, contested and denied the right of Nicholas King to any part of the Iowa lands. They denied also that said lands were purchased with partnership or trust funds

Upon the foregoing allegations, the cause was heard, and decided by the Circuit and Supreme Courts, and upon the return of the cause to the Circuit Court—the master in chancery made and stated an account as stated in the bill—and for the change in the account as first made, assigns the following reasons.

"I further report to the court that in the examination of the testimony in the cause, upon which the foregoing report, and my former reports were made, no inquiry was had or made in relation to any settlement of the accounts between the estates of William King and Joseph King, there being no allegations in the pleadings as between said estates on which such testimony was deemed proper. It is now shown to me however, that a settlement of the accounts between said estates was made subsequent the death of Joseph King, and from the nature of that settlement, (a memorandum of which is hereto annexed,) and the position of the parties, it is fair to presume that William King's estate has fully accounted to the estate of Joseph King for all that the latter estate is entitled to; so that William King ought to be held to have received the money from Wesley Waggoner and interest amounting to \$731 40, which I have in the foregoing report charged to the representatives of Joseph King, and the representatives of William King, are therefore in account with Nicholas King to be charged with that amount in addition to the sum I have above stated to be due from him to them. Taking the settlement of accounts between the estates of William King and Joseph King, to be a full adjustment of accounts between them, the representatives of the latter would have no claim to any interest in the lands in Iowa.

This statement of accounts by the Master shows the following results :

No. 1.	The copartnership Dr. to N. King.....	\$2,294 08
	Cr. By rents received.....	776 38
	Balance due N. King.....	\$1,517 70
No. 2.	Representatives of W. King to the Copartnerships, Dr. For cash and rents received.....	\$9,330 40
	Cr. For Disbursements.....	4,369 77
	Balance.....	\$5,178 63
No. 3.	Representatives of Joseph King to the Copartnership. Cash from Waggoner for Land.....	\$ 400 00
	Interest to 25th October 1855.....	331 40
	Balance.....	\$ 731 40
Indebtedness of parties respectively resulting from the foregoing statement:		
The representatives of William are indebted to Nicholas—		
	For one-fifth of \$1,517 70 ballance of account, No. 1.....	\$ 303 54
	For three-fifths of \$5,178 63, ballance of account, No. 2.....	3,107 18
	Being in all.....	\$ 3,410 72
To which Nicholas is entitled, from the Representatives of William, in addition to a conveyance of three-fifths of the Iowa Lands. The representatives of Joseph King are indebted to Nicholas—		
	For one-fifth of \$1,517 70 ballance of account No. 1.....	\$ 303 54
	For three-fifths of \$731 40 ballance of account No. 3.....	438 84
	Total.....	\$ 742 38
To which Nicholas is entitled from Representatives of Joseph.		

Upon the Report of the Master, the Court entered the following decree: "On this 17th October, 1855, came the complainant by his solicitor, David A. Smith, and the defendants by their solicitor, W. Thomas. The complainant, by his solicitor, produced and filed the opinion of the Supreme Court of this State, Second Grand Decision, and certificate of reversal of the decree that was rendered in

this cause on the 25th of October, 1854, as also a third statement of account in this cause, by James Berdan, Esq., special master in this case, made in conformity with the said opinion of the Supreme Court, and to which account, as stated, no exception was taken, and which is therefore approved by the Court. From this account it appears, that the Representatives of the estate of William King are indebted to the complainant in the sum of \$4,153 10 cents. It is ordered, adjudged and decreed by the Court that the complainant have, receive and recover from the estate of said deceased, said sum of money to be paid in due course of Administration &c.;" and then proceeds: "The Supreme Court having so decided, it is further ordered, adjudged and decreed by the Court, that the complainant is, as tenant in common, entitled in fee simple to an undivided three-fifths of the lands in the State of Iowa. (Here the lands are described.) The Court then after stating the reasons, proceeds to decree a sale of the said Iowa land—and thus proceeds: "The surplus monies as realized from time to time, to be paid to the parties in this cause, as follows: To the complainant, or his proper representative, three-fifths, and to the representatives of the estate of William King, deceased, the other two-fifths, the interest on one-third of said two-fifths to be paid to said Rachael King for life, in lieu of dower. And saving and reserving to the representatives of the estate of Joseph King, deceased, as between them and the representatives of the estate of William King, deceased, the right to show that they, the representatives of said Joseph King, deceased, are entitled to the net proceeds of the sales of one-fifth of said lands."

Under this decree the Iowa lands were sold in June, 1856.

On the 11th June, 1857, the representatives of Joseph King, Mary A. Wade and others commenced this suit, claiming the one-fifth of the net proceeds of the sale. Upon a hearing of the cause, before the Circuit Court, the bill was dismissed; and upon appeal to the Supreme Court, January term, 1858, this decree dismissing the bill was reversed, upon the ground of the exclusion of depositions taken in the case of Nicholas King. The abstract then furnished the Court by the complainants is copied in *17 Dec 22 301*.

and is here referred to, to show their version of the contents of the record. The defendant, Thomas, not being satisfied with the abstract so furnished, in respect to the defense and the facts relied on by the answers, filed the following statement:

The abstract of the plaintiffs in error, with reference to the final decree of Morgan Circuit Court—the proceedings under that decree—and of the bill now bearing the Court is sufficiently full for all the purposes of this suit—but the facts relied on by the answer are not so stated—the following part of said answer is therefore copied.

The said Thomas, in answer to that part of the bill charging fraud, says "that in the spring of 1852, John Peter, executor of Joseph King, visited Jacksonville for the purpose of seeing John C. Hamilton, administrator of William King, and of closing a settlement between the estates. Said Hamilton being absent, said Peter called on the defendant with a view to said settlement, he being the guardian for the children of said William King, and attorney for said Hamilton, said Peter presented a statement of an account, which the defendant then believed, and still believes, was in the hand-writing of M. Link, Esq., Judge of the Green County Court, with a balance against the estate of William King of probably \$100, and stated that said Hamilton, as Administrator, held a note of him, the said Peter, given to William King, which he wanted to obtain in satisfaction of said balance; the defendant could not make any settlement, but took the account, and promised upon the return of Mr. Hamilton to have the matter adjusted. Upon subsequently seeing said Hamilton, the note of Peter was obtained, the amount of which, when credited, exceeded the amount of balance of accounts as presented, \$4 79; this defendant then, from the account so presented to him, made the statement of account above referred to by the complainant, including in the credit of payment to "John Peter, surviving executor," the amount of his note, whatever it was, he then sent the account presented to him, the note of said Peter, and the account so made by him, to the said Peter, and the account as made out, was returned to him receipted as it now appears, with the \$4 79. This defendant believed at the time of the transaction, that a settlement had been made of the accounts of the two estates, before and by the Judge of the Green County Court, which had been made a matter of record in said Court, and that the Judge had stated the result, simply to enable the said Peter to obtain the balance. He did not know but that said charge of \$2,281 10, was the footing of a long account, and in fact such was his impression at the time. When the master in chancery had made a statement of the accounts in October, 1855, in the suit of Nicholas King, aforesaid, this defendant did, acting as the guardian and attorney for the heirs of William King, insist before said master, that as no inquiry had been made in regard the accounts between the estates of Joseph and William King, it would be wrong to report any balance as between said estates, and he presented to said master the statement and receipt aforesaid, as evidence that settlements had been made between said estates, and urged that as a reason why no balance should be reported. The said Thomas, was of opinion, that upon the pleadings in the case, and evidence taken, no decree could rightfully or legally be entered as between the estates of Joseph and William King, and that if the children of Joseph King were entitled to anything, they would not be barred or precluded from asserting their right whenever they might think proper to do so. The said Thomas also urged as a reason against reporting as between said estates, that said children of Joseph King had not asserted any claim in the suit, although they had arrived at mature age, and were fully advised in regard to said suit, and of all the matters in controversy therein. The said Thomas further states, that he had been informed, and he believed the fact so to be, that said Joseph N. King and William W. King had both stated, that they did not believe that said Nicholas King was entitled to any part of the lands in Iowa, and as for themselves, they should never set up any claim, as they knew that their uncle William had purchased said lands for his own use, and not for uncle Nicholas and them; and this defendant may have stated this information to said master in chancery. Upon the statements and suggestions made to said master,

and the further statement by this defendant, that the balance found due from the estate of Joseph King to Nicholas King might be charged against the estate of William King, the said master in chancery changed the report so as to make it as it now appears.

The said defendant also conversed with the solicitor of Nicholas King, and made known to him what change he desired in the report, and the reasons therefor, and this defendant is sure that said solicitor concurred with him in opinion, that the case was not in a situation to have the accounts between the two estates finally settled by decree. This defendant is certain that neither the master in chancery, or himself, or the solicitor of Nicholas King, intended any wrong or fraud in respect to the rights of complainants, nor did any one of them believe that said complainants would be concluded by the said report, or any decree that might be entered thereon."

The foregoing statement of the records shows the questions before the Court when the decree was entered, in October, 1855, and first; that the present complainants or plaintiffs in error, had not, at the date of said decree, set up, or asserted any claim to any part of the Iowa lands, or the proceeds thereof, and that no questions were made in respect to any such claims. Second: That the Court did not, nor could not, rightfully make any decree barring or concluding the said parties in respect to their right to a part of said Iowa lands.

The undersigned now contend, that the Circuit Court decided correctly in the case now before the court.

1. The record was properly excluded, because the questions decided by the Court were not the same as those involved in the present case.

2. The said suit, (the record of which was excluded.) was prosecuted, and the testimony therein taken for one purpose, and the present suit is for another.

3. The record shows, that the opinion of the Supreme Court, relied on, was predicted in part upon the testimony of Rachel King, widow of William King, who was, and is, an incompetent witness in the case.

4. The proceedings before the master in chancery, and his action in the case, could not, under any state of pleadings, be evidence, until confirmed or approved by the Court—but if they could, then the whole must be taken together, and his report shows that complainants have no rights.

5. The right of plaintiffs in error to a decree depended on proof, that they, as the heirs of Joseph King, were entitled to one-fifth of the Iowa lands, and the record offered in evidence, did not prove, or tend to prove this fact, but on the contrary, so far as it proved any thing in the case, proved that they were not so entitled.

LOGAN & LINCOLN.

At the October term, 1858, the cause was again heard before the Circuit Court—and decree entered in favor of complainants, from which this appeal is prosecuted. Upon that hearing, the record shows that the defendants objected to the reading of the record of the suit of Nicholas King against the representatives of William King, as evidence.

First, because the matters in controversy in said suit were different and between different parties, and the object of the suit was different from those in the present suit.

Second, because by the laws of the land the said Record is not competent evidence.

Third, because the decree in said cause was predicated in part, upon the testimony of Rachael King widow of William King, who is an incompetent witness in the present suit.

Fourth, because the said record, if used as evidence, prove nothing as between the parties to the present suit, in respect to the points in controversy.

Fifth, because the depositions of said suit were not taken with reference to the matters in controversy in this suit, nor for the purpose of settling any question as between the estates of Joseph King and William King.

The depositions of Rachael King objected to, because she was the widow of William King, and was therefore incompetent to testify. The Record also shows that all of these objections were overruled except in respect to the deposition of Rachael King—and that the parties agreed, that upon the hearing of this cause before the Supreme Court at January term, 1859, the record on file in that court, should be used as far as applicable, so as to save necessity of obtaining another copy.

Upon enquiry during the term of the court, the record referred to could not be found—application was then made to the Clerk of the Circuit Court for another copy, and it was then ascertained that the depositions taken in the case of Nicholas King against the heirs of Wm. and Joseph King composing a part of the record, and to which the objections applied, could not be found, and further, that those depositions were not on file in October, 1858, where the decree now complained of was renewed.

The case being thus situated, Mr. Smith, for Wade and others, agreed before this court, that the depositions referred to were not on file at the time the decree was entered, and that they could not now be found; that defendant, Thomas, was not present when the decree was entered, but had, before the entry thereof, given written directions in regard to it, supposing that the depositions were on file. It was then agreed that the cause should be heard upon the record as it was, unless the depositions could be found, in which case they were to be used, upon this understanding which it is believed was entered on the record, or on the docket of the Chief Justice. Mr. Smith argued the cause for defendants—the errors assigned are—

First, The Court erred in permitting the record of the suit of Nicholas King against the heirs of William and Joseph King to be used as evidence in the cause.

Second, The Court erred in permitting the Report of the master in Chancery, made and filed in the case of Nicholas King against John C. Hamilton, administrator, and the heirs of W. & J. King, to be used as evidence in the cause, and also in permitting the decree in said case to be used as evidence in said cause.

Third, The Court erred in entering a decree in favor of the complainants for any part of the proceeds of the Iowa lands, there being no testimony proving that any of the money of the said complainants was ever used in purchasing said lands.

Fourth, The Court erred in decreeing anything due the complainants and not dismissing the bill. The present Record contains:—

1. The Bill in Chancery. *Page 1 to 19*
2. The Master's Third Report. *21 to 26*
3. The account received by Peters, referred to in the bill and Master's report. *26*
4. The decree of N. King, of October, 1855. *27 to 32*
5. The agreement of Kings as to their interest in the lands purchased in name of N. King. *32*
6. The Will of Joseph King. *33*
7. The sums in chancery. *37*
8. Answer of John Peter. *38 to 41*
9. Answer of G. C. King, jr. and others. *43 to 51*
10. Decree of October, 1858, and exceptions. *61 to 64*
11. Replicators to answers. *55*
12. Deposition of John Peter. *55 to 58*
13. Deposition of Berdan. *58 to 60*
14. The Bill filed by N. King. *67 & Master's Report of 14 Decr 1853.*

The Record as now presented to the Court, and upon which the case must be decided, does not contain any of the testimony or depositions taken in the case of N. King against the Representatives of William and Joseph King, for the exclusion of which evidence the decree of the Circuit Court was reversed at the last term of this Court.

The Appellants contend—

First, That by the decree of October, 1855, the rights of all the parties, to that suit, were settled, and that said parties are concluded, in respect to all questions so far as dependant on that suit, then adjudicated by the court; errors in that decree, in respect to law or facts, can only be corrected by the Supreme Court. The saving or reservation in the decree, places the complainants in the same position that they would have occupied if no suit had been brought, or decree entered. I. Greenleaf, p. 596, note 2, p. 593. See 528, *Gilston vs. Codwire & Johnson*, chancery 193. *Jones vs. Smith* 13 Ill. R. 304. *Way & Humphreys* 20 Ill. R. 45

Second, That no one of the parties can go into an enquiry as to the reasons on which the Court acted in making the decree, nor can they show, that upon the facts before the Court, the decree should have been different, except upon errors alleged before the Supreme Court. *Buckmaster vs. Ryder* 12 Ill. R. 211. *Horsquith vs. Horsquith* 19 Ill. R. 79.

Third, But for the reservation or saving of the rights of the complainants in this cause, they would have no other remedy than by appeal or writ of error. By that reservation their right to sue for, and recover the one-fifth, if entitled to it, is fully protected. *Buckmaster vs. Ryder* 12 Ill. R. 211.

Fourth, Acting upon the correctness of the foregoing propositions, the complainants have filed this bill, asserting their right to one-fifth of the Iowa lands, or the proceeds of the sale thereof. And the only question presented is, have they any right to said lands?

They charge that they are entitled to the said one-fifth because of the investment of their funds to that extent in its purchase, and this is the only ground on which they can rightfully or legally assert their claim. This charge is positively denied by the answers, and the record furnishes no evidence of its truth. Upon this view of the case, there can be no pretense of right to recover. But the complainants seek a recovery upon the ground that, by the opinion of the Supreme Court in the case of N. King, (16 Illinois Reports 190) they are entitled to a recovery, and they insist that this opinion of the court is binding and conclusive in the premises. Although the record offered in evidence (not including the depositions,) would be received, to prove itself, and prove what was decided or decreed, yet not to prove that the funds of complainants or their ancestor, were invested in the purchase of the lands, nor that complainants are entitled to one-fifth of the proceeds of the sale. The final decree, which settled the rights of the parties in that suit, proves that they were not so entitled. And the decree was inadmissible as evidence, for any other purpose than as above stated, if for no other reason because it was obtained upon the testimony in part of Rachael King, who was an incompetent witness. Joseph King died in 1843; the Iowa land was purchased in 1846.

The appellants contend further—

First, That whatever might have been the duty of the Court, or whatever might have been the rights of the parties under the opinion of this Court, as reported in 16th Ill. 190, when that opinion was filed, the decree entered in October, 1855, concludes and binds the parties to that suit, (and, as before stated, the complainants acting upon this view of the law, have filed this bill, with a view to show they are entitled to the net proceeds of the sale of one-fifth of the lands, and this they do after the sale, and after it is known that the one-fifth exceeds the amount of indebtedness of Joseph King to Nicholas King.)

Second, That to entitle the complainants to a decree in this cause, they must prove that their money, or that of their ancestor was used in purchasing said land.

Third, The written or printed opinion of the Supreme Court, predicated upon evidence not now before the Court, cannot be allowed to stand in the place of the evidence, nor to supply evidence sustaining the decree. It is the final judgment or decree in a cause which binds and concludes. I. Greenleaf p. 523-4 Sec. 528-9.

Fourth, The record of the cause, if evidence against must be evidence for the Appellants, and this proves that complainants are not entitled to any relief. I Greenleaf Sec. 528-9. 2 Starkin side page 221.

Third, The Court erred in entering a decree in favor of the complainants for any part of the proceeds of the Iowa lands, there being no testimony proving that any of the money of the said complainants was ever used in purchasing said lands.

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The appellants contend further—

First, That whatever might have been the duty of the Court, or whatever might have been the rights of the parties under the opinion of this Court, as reported in 16th Ill. 190, when that opinion was filed, the decree entered in October, 1855, concludes and binds the parties to that suit, (and, as before stated, the complainants acting upon this view of the law, have filed this bill, with a view to show they are entitled to the net proceeds of the sale of one-fifth of the lands, and this they do after the sale, and after it is known that the one-fifth exceeds the amount of indebtedness of Joseph King to Nicholas King.)

Second, That to entitle the complainants to a decree in this cause, they must prove that their money, or that of their ancestor was used in purchasing said land.

Third, The written or printed opinion of the Supreme Court, predicated upon evidence not now before the Court, cannot be allowed to stand in the place of the evidence, nor to supply evidence sustaining the decree. It is the final judgment or decree in a cause which binds and concludes. I. Greenleaf p. 523-4 Sec. 528-9.

Fourth, The record of the cause, if evidence against must be evidence for the Appellants, and this proves that complainants are not entitled to any relief. I Greenleaf Sec. 528-9. 2 Starkin side page 221.

5. As the complainants have made their case, and as it now stands before the court, they have no right to recover unless the evidence, sustains their claim—they are not concluded by the record, because of the reservation,—but the record as it is, disproves their right to recover, and they must rely upon other evidence.

6. The opinion and judgment of the Supreme Court of the January Term 1859, settles the question that the despositions regularly taken in the case of Nicholas King, are evidence in this case, but it is not decided or intimated that the record or decree or the report of the master in chancery are admissible.

7. But assuming that the report of the master in chancery, is admissible as evidence, the court will see by looking at that report, that Joseph King had received his full proportion of the proceeds of all the sales of the Morgan county lands, at the time of the purchase of the Iowa lands, and that his heirs had no money in the hands of William King at the time he made these purchases, nor at any time afterwards.

The appellants contend further :

1. That this court cannot, in this proceeding inquire into, or change the decree entered in October 1855. Upon proof of the allegation that the land was purchased with their money they may recover, but they cannot in this proceeding reverse or change that decree.

2. That whatever may have been the proper remedy of the complainants or the proper mode of proceeding to enforce that remedy,—are questions not now before the court, they have filed their bill, as they had the right to do, asserting their right to one-fifth of the land in controversy upon the ground of the investment of their funds, and the court cannot aid them without proof of such investment.

3. The questions now presented, are not, what this, or that court may have said, or even decided in regard to complainants rights, upon a given, or supposed state of facts, but what are their rights upon the facts now before the court.

4. The appellants have heretofore and still do, contend, that upon the pleadings in the case of Nicholas King, no questions was presented, or could be decided in respect to the land, except as to the right of three-fifths thereof. It was no where alleged, that Joseph King's heirs had any interest in that land. They claimed no interest.

5. The court cannot decide this case for complainants except upon one of two grounds,

1. That it is competent for a party to file a bill in chancery to correct a former decree by showing, that the court acted erroneously, or upon a supposed state of facts which did not exist.

2. That complainants rights have not been adjudicated, the first presents a question of law, and the last a question of fact, as to whether funds of Joseph King or his heirs were used in the purchase.

~~As this case was presented at the last term, it was expected, that the court would decide the questions, as to the admissibility and effect of the decree of October 1855 as evidence, and that if the decision was, that the complainant could in this form of proceeding obtain a reversal, or change of that decree, the question would then arise upon the testimony whether or not as matter of fact, the allegation of the investment of complainants funds in the Iowa lands had been proven, but the court, thinking, most probably, that the circuit court should first pass upon the testimony, confined its opinion to the simple point of admissibility. That question being determined, it now remains for the court to decide the other. It was believed and contended, that upon the facts then before the court, the complainant had no right to recover.~~

In the view of the counsel, the complainants and their case, stand precisely in the position which they would have occupied, if no decree had ever been made in favor of Nicholas King, nor no suit brought of him, they claim one-fifth of the Iowa lands, upon the ground of the investment of their funds in its purchase, their right is contested, and the facts charged are denied, to recover, they must sustain by evidence, the truth of this allegation.

The charges of fraud against the guardian and attorney of W. King's children, in obtaining the decree of 1855, is not only answered, but disproved by the admitted facts in the record. Nothing was done, or intended to be done, to prevent the complainants from showing their right to one-fifth of the lands in controversy, whenever they might think proper to do so.

They have, by the advice of counsel, brought this suit, and no attempt has been made to use the decree obtained to their prejudice.

LOGAN & LJNCOLN, For Appellants.

*The Record in this case was made out under the direction and Superintendance of Mr Smith, and at the time of printing the foregoing abstract and Brief, I supposed every thing had been copied which Mr Smith believed should be incorporated in the Record, but since the printing Mr Smith has informed me, that he regarded a Report made by the Master in the case of Nicholas King and filed the Record 1853 as part of the Record, and that as such*

he refused to it in his arguments last Winter,  
I did not hear the argument, or I should have  
have insisted, that the Report could not be  
used as evidence, and that it was in fact  
no part of the Record.

That the questions and the case may be settled,  
the Report is attached to the Record, marked  
"Nicholas King vs John C Hamilton & Masters  
Report," Filed 14 December 1853.

The Report is not specifically referred to in  
the pleadings, nor in any decree or opinion  
of the court, and unless made so by  
exceptions, or some action of the court  
express it, does not form part of the Record.  
It could not be used as evidence in the  
case now before the court, because it  
does not contain, nor purport to contain,  
the testimony of witnesses, but simply the  
conclusions of the master from testimony  
not now before the court, If a decree  
had been made upon the Report, such  
decree would be evidence for some  
purpose, but the Report would not  
for any other than to prove itself.

W. D. Morrison  
for Appellants.

# IN SUPREME COURT,

~~DECEMBER TERM, 1858~~

*January Term 1859.*

HEIRS OF W. KING, APPELLANTS,  
vs.  
WADE AND OTHERS, APPELLEES. } Decree of Morgan.

The record in this case shows the following facts:

In January, 1851, Nicholas King filed his Bill in Chancery in Morgan Circuit Court, against the personal representatives and heirs of William King and Joseph King, (two deceased brothers,) stating "that in the year 1829 he was a resident of Yorkshire, old England, and his brothers, William King and Joseph King, were residents of said State of Illinois, that during that year, he and his said brothers entered into partnership for the purpose of dealing in real estate, and their capital so to be employed was one thousand pounds sterling money, or \$1,840 money of the United States, that said capital was placed in the hands of said William, or William and Joseph King for that purpose in the following proportions: three-fifths to the use of said Nicholas, one-fifth to the use of said Joseph King, and one-fifth to the use of said William King.

That afterwards the following lands, in the counties of Morgan and Scott, in the State of Illinois; were purchased by said Nicholas, out of said capital, and the titles in fee made to him, (here the lands are described,) having cost \$2,507 35. The proportion of said Nicholas in said £1000 was \$2,904 00.

His proportion of aforesaid investment \$1,504 41; due him, after said investment, \$1,399 59. The proportion of said William King in said £1000, was \$968 00. His proportion of said investment, \$501 47; due him, after said investment, \$466 53." Joseph King's proportion and investment being the same.

The aforesaid lands, at the dates of the purchases of the same, were partly improved, and partly wild lands; the said William King took possession and control of the same, and until the sale of a portion of the same as hereinafter stated, and until his death as hereinafter stated, of the remaining portion of said lands, improved and rented, or occupied the same, paid the taxes, &c., but never kept any specific account in the premises of his disbursements and receipts."

He here sets out certain sales of parts of the land purchased, alleging the amount of sales to have been \$3,995 67, and claiming three-fifths thereof.

"On the 27th of June, 1843, the said William King being on a visit to old England, at Pickering, Yorkshire, a memorandum in writing was made and signed by him and your orator in the words and figures following:

Memorandum: Whereas, in and about the purchase of the property which I, Nicholas King, bought in the State of Illinois, U. S., and which is now held by my brothers, Joseph King and William King, under power of attorney given by me, the sum of one thousand pounds was expended, that is to say six hundred pounds by me, and two hundred pounds by each of my brothers, Joseph and William, this is to certify that we, Joseph King, William King and Nicholas King, do now hold the whole of said lands and properties, together with their proceeds, whether by sale or otherwise, in the proportion of the above sums respectively, and each agrees to account to the others for any of money or other portions of the above property they may have received, or may hereafter receive."

The bill then states that Joseph King, after having executed his last will and testament, departed this life in 1842. That by said will John Peter and William King were appointed executors, and testamentary guardians for his children, Mary Ann Rhoda, who had been married to William Wade, Joseph N. King, and William W. King. The bill then states "that in the years 1845 and 1846, the said William King, by the application of the sum of \$3,000, more or less, of the capital trust and partnership funds, or in trust for your orator to the extent of an undivided three-fifths, become the purchaser of the title in fee simple to the following lands in the county of Clayton and State of Iowa." (Here the lands are described, and their cost stated.)

The bill then states that William King died in 1846, having executed his last will and testament. That John C. Hamilton Administrator, with the will annexed of William King, had obtained a judgment against him on a note given to said Wm. King, that Robert Cultas had also obtained a judgment, both of which operated as liens upon the lands in Morgan and Scott. That the lands remaining unsold in Morgan and Scott had been sold by agreement of parties in interest, and proceeds to which complainant was entitled. applied to the payment of the judgments above referred to, and one-fifth thereof paid over to each of the estates of William and Joseph King.

The heirs and personal representatives of Joseph King and William King are next described and named, and made parties. The bill asks that they may be required to answer on oath &c." The said John C. Hamilton and William Thomas are specifically called upon to exhibit a full and accurate description of any lands in the county of Clayton and State of Iowa, of which said William King died seized in fee simple, of whom he purchased the same?—when?—with what funds?—at what cost? and whether or not in trust for your orator, and to his use to the extent of three-fifths? They are also called upon to state specifically, whether or not the funds derived as aforesaid, from sales of land to the said Jacob Strawn and John Richardson, (to whom parts of the lands in Morgan and Scott have been sold by William King.) were not applied to the purchase of said lands in said county and State, or elsewhere?"

The bill then prays that a special commissioner be appointed and required, "to state a full, just and true account between the parties in interest in this case, according to their relative and respective rights and responsibilities in the premises to take and report all the evidence that the said parties may give, or adduce in the premises, and if on such liquidation and adjustment of accounts, any

balance may be due to your orator in the premises, he prays your honor to grant him a final decree for the payment of the same; or if it should appear from the evidence that may be reported in this cause, that your orator is entitled to have conveyed to him an undivided three-fifths of the Iowa land, he prays your honor on the final hearing of this cause, to decree a proper and apt conveyance in the premises, and for such other and further relief as your orator may be entitled to, according to the structure and equity of his cause, &c."

To the foregoing bill, the present complainants, Wade and wife, made no answer or defense. The complainants, Joseph N. and William W. King, answered by their guardians *ad litem*;—no answer was filed by the testamentary guardians.

The answer of Joseph N. King and William W. King by their guardians, is in substance "they have no personal information in relation to the matters and things stated in the bill. They refer to the answer of the other infant defendants as containing all the facts and suggestions in relation to the rights of the parties as far as known.

These defendants suppose that upon a settlement of the accounts between their fathers, Joseph King and the said Nicholas King, something will be found to be due from said Nicholas, but they do not know that that settlement can have any necessary connection with this suit."

The representatives of William King, by their answer, contested and denied the right of Nicholas King to any part of the Iowa lands. They denied also that said lands were purchased with partnership or trust funds

Upon the foregoing allegations, the cause was heard, and decided by the Circuit and Supreme Courts, and upon the return of the cause to the Circuit Court—the master in chancery made and stated an account as stated in the bill—and for the change in the account as first made, assigns the following reasons.

"I further report to the court that in the examination of the testimony in the cause, upon which the foregoing report, and my former reports were made, no inquiry was had or made in relation to any settlement of the accounts between the estates of William King and Joseph King, there being no allegations in the pleadings as between said estates on which such testimony was deemed proper. It is now shown to me however, that a settlement of the accounts between said estates was made subsequent the death of Joseph King, and from the nature of that settlement, (a memorandum of which is hereto annexed,) and the position of the parties, it is fair to presume that William King's estate has fully accounted to the estate of Joseph King for all that the latter estate is entitled to; so that William King ought to be held to have received the money from Wesley Waggoner and interest amounting to \$731 40, which I have in the forgoing report charged to the representatives of Joseph King, and the representatives of William King, are therefore in account with Nicholas King to be charged with that amount in addition to the sum I have above stated to be due from him to them. Taking the settlement of accounts between the estates of William King and Joseph King, to be a full adjustment of accounts between them, the representatives of the latter would have no claim to any interest in the lands in Iowa.

This statement of accounts by the Master shows the following results :

No. 1.	The copartnership Dr. to N. King.....	\$2,294 08
	Cr. By rents received.....	776 38
		<hr/>
	Balance due N. King.....	\$1,517 70
No. 2.	Representatives of W. King to the Copartnerships, Dr. For cash and rents received.....	\$9,330 40
	Cr. For Disbursements.....	4,369 77
		<hr/>
	Balance.....	\$5,178 63
No. 3.	Representatives of Joseph King to the Copartnership. Cash from Waggoner for Land.....	\$ 400 00
	Interest to 25th October 1855.....	331 40
		<hr/>
	Balance.....	\$ 731 40
Indebtedness of parties respectively resulting from the foregoing statement:		
The representatives of William are indebted to Nicholas—		
	For one-fifth of \$1,517 70 ballance of account, No. 1.....	\$ 303 54
	For three-fifths of \$5,178 63, ballance of account, No. 2.....	3,107 18
		<hr/>
	Being in all.....	\$ 3,410 72
To which Nicholas is entitled, from the Representatives of William, in addition to a conveyance of three-fifths of the Iowa Lands. The representatives of Joseph King are indebted to Nicholas—		
	For one-fifth of \$1,517 70 ballance of account No. 1.....	\$ 303 54
	For three-fifths of \$731 40 ballance of account No. 3.....	438 84
		<hr/>
	Total.....	\$ 742 38

To which Nicholas is entitled from Representatives of Joseph.

Upon the Report of the Master, the Court entered the following decree: "On this 17th October, 1855, came the complainant by his solicitor, David A. Smith, and the defendants by their solicitor, W. Thomas. The complainant, by his solicitor, produced and filed the opinion of the Supreme Court of this State, Second Grand Decision, and certificate of reversal of the decree that was rendered in

this cause on the 25th of October, 1854, as also a third statement of account in this cause, by James Berdan, Esq., special master in this case, made in conformity with the said opinion of the Supreme Court, and to which account, as stated, no exception was taken, and which is therefore approved by the Court. From this account it appears, that the Representatives of the estate of William King are indebted to the complainant in the sum of \$4,153 10 cents. It is ordered, adjudged and decreed by the Court that the complainant have, receive and recover from the estate of said deceased, said sum of money to be paid in due course of Administration &c.;" and then proceeds: "The Supreme Court having so decided, it is further ordered, adjudged and decreed by the Court, that the complainant is, as tenant in common, entitled in fee simple to an undivided three-fifths of the lands in the State of Iowa. (Here the lands are described.) The Court then after stating the reasons, proceeds to decree a sale of the said Iowa land—and thus proceeds: "The surplus monies as realized from time to time, to be paid to the parties in this cause, as follows: To the complainant, or his proper representative, three-fifths, and to the representatives of the estate of William King, deceased, the other two-fifths, the interest on one-third of said two-fifths to be paid to said Rachael King for life, in lieu of dower. And saving and reserving to the representatives of the estate of Joseph King, deceased, as between them and the representatives of the estate of William King, deceased, the right to show that they, the representatives of said Joseph King, deceased, are entitled to the net proceeds of the sales of one-fifth of said lands."

Under this decree the Iowa lands were sold in June, 1856.

On the 11th June, 1857, the representatives of Joseph King, Mary A. Wade and others commenced this suit, claiming the one-fifth of the net proceeds of the sale. Upon a hearing of the cause, before the Circuit Court, the bill was dismissed; and upon appeal to the Supreme Court, January term, 1858, this decree dismissing the bill was reversed, upon the ground of the exclusion of depositions taken in the case of Nicholas King. The abstract then furnished the Court by the complainants is copied in *19 Dec 301*.

and is here referred to, to show their version of the contents of the record. The defendant, Thomas, not being satisfied with the abstract so furnished, in respect to the defense and the facts relied on by the answers, filed the following statement:

The abstract of the plaintiffs in error, with reference to the final decree of Morgan Circuit Court—the proceedings under that decree—and of the bill now bearing the Court is sufficiently full for all the purposes of this suit—but the facts relied on by the answer are not so stated—the following part of said answer is therefore copied.

The said Thomas, in answer to that part of the bill charging fraud, says "that in the spring of 1852, John Peter, executor of Joseph King, visited Jacksonville for the purpose of seeing John C. Hamilton, administrator of William King, and of closing a settlement between the estates. Said Hamilton being absent, said Peter called on the defendant with a view to said settlement, he being the guardian for the children of said William King, and attorney for said Hamilton, said Peter presented a statement of an account, which the defendant then believed, and still believes, was in the hand-writing of M. Link, Esq., Judge of the Green County Court, with a balance against the estate of William King of probably \$100, and stated that said Hamilton, as Administrator, held a note of him, the said Peter, given to William King, which he wanted to obtain in satisfaction of said balance; the defendant could not make any settlement, but took the account, and promised upon the return of Mr. Hamilton to have the matter adjusted. Upon subsequently seeing said Hamilton, the note of Peter was obtained, the amount of which, when credited, exceeded the amount of balance of accounts as presented, \$4 79; this defendant then, from the account so presented to him, made the statement of account above referred to by the complainant, including in the credit of payment to "John Peter, surviving executor," the amount of his note, whatever it was, he then sent the account presented to him, the note of said Peter, and the account so made by him, to the said Peter, and the account as made out, was returned to him receipted as it now appears, with the \$4 79. This defendant believed at the time of the transaction, that a settlement had been made of the accounts of the two estates, before and by the Judge of the Green County Court, which had been made a matter of record in said Court, and that the Judge had stated the result, simply to enable the said Peter to obtain the balance. He did not know but that said charge of \$2,281 10, was the footing of a long account, and in fact such was his impression at the time. When the master in chancery had made a statement of the accounts in October, 1855, in the suit of Nicholas King, aforesaid, this defendant did, acting as the guardian and attorney for the heirs of William King, insist before said master, that as no inquiry had been made in regard the accounts between the estates of Joseph and William King, it would be wrong to report any balance as between said estates, and he presented to said master the statement and receipt aforesaid, as evidence that settlements had been made between said estates, and urged that as a reason why no balance should be reported. The said Thomas, was of opinion, that upon the pleadings in the case, and evidence taken, no decree could rightfully or legally be entered as between the estates of Joseph and William King, and that if the children of Joseph King were entitled to anything, they would not be barred or precluded from asserting their right whenever they might think proper to do so. The said Thomas also urged as a reason against reporting as between said estates, that said children of Joseph King had not asserted any claim in the suit, although they had arrived at mature age, and were fully advised in regard to said suit, and of all the matters in controversy therein. The said Thomas further states, that he had been informed, and he believed the fact so to be, that said Joseph N. King and William W. King had both stated, that they did not believe that said Nicholas King was entitled to any part of the lands in Iowa, and as for themselves, they should never set up any claim, as they knew that their uncle William had purchased said lands for his own use, and not for uncle Nicholas and them; and this defendant may have stated this information to said master in chancery. Upon the statements and suggestions made to said master,

and the further statement by this defendant, that the balance found due from the estate of Joseph King to Nicholas King might be charged against the estate of William King, the said master in chancery changed the report so as to make it as it now appears.

The said defendant also conversed with the solicitor of Nicholas King, and made known to him what change he desired in the report, and the reasons therefor, and this defendant is sure that said solicitor concurred with him in opinion, that the case was not in a situation to have the accounts between the two estates finally settled by decree. This defendant is certain that neither the master in chancery, or himself, or the solicitor of Nicholas King, intended any wrong or fraud in respect to the rights of complainants, nor did any one of them believe that said complainants would be concluded by the said report, or any decree that might be entered thereon."

The foregoing statement of the records shows the questions before the Court when the decree was entered, in October, 1855, and first; that the present complainants or plaintiffs in error, had not, at the date of said decree, set up, or asserted any claim to any part of the Iowa lands, or the proceeds thereof, and that no questions were made in respect to any such claims. Second: That the Court did not, nor could not, rightfully make any decree barring or concluding the said parties in respect to their right to a part of said Iowa lands.

The undersigned now contend, that the Circuit Court decided correctly in the case now before the court.

1. The record was properly excluded, because the questions decided by the Court were not the same as those involved in the present case.

2. The said suit, (the record of which was excluded.) was prosecuted, and the testimony therein taken for one purpose, and the present suit is for another.

3. The record shows, that the opinion of the Supreme Court, relied on, was predicted in part upon the testimony of Rachel King, widow of William King, who was, and is, an incompetent witness in the case.

4. The proceedings before the master in chancery, and his action in the case, could not, under any state of pleadings, be evidence, until confirmed or approved by the Court—but if they could, then the whole must be taken together, and his report shows that complainants have no rights.

5. The right of plaintiffs in error to a decree depended on proof, that they, as the heirs of Joseph King, were entitled to one-fifth of the Iowa lands, and the record offered in evidence, did not prove, or tend to prove this fact, but on the contrary, so far as it proved any thing in the case, proved that they were not so entitled.

LOGAN & LINCOLN.

At the October term, 1858, the cause was again heard before the Circuit Court—and decree entered in favor of complainants, from which this appeal is prosecuted. Upon that hearing, the record shows that the defendants objected to the reading of the record of the suit of Nicholas King against the representatives of William King, as evidence.

First, because the matters in controversy in said suit were different and between different parties, and the object of the suit was different from those in the present suit.

Second, because by the laws of the land the said Record is not competent evidence.

Third, because the decree in said cause was predicated in part, upon the testimony of Rachael King widow of William King, who is an incompetent witness in the present suit.

Fourth, because the said record, if used as evidence, prove nothing as between the parties to the present suit, in respect to the points in controversy.

Fifth, because the depositions of said suit were not taken with reference to the matters in controversy in this suit, nor for the purpose of settling any question as between the estates of Joseph King and William King.

The depositions of Rachael King objected to, because she was the widow of William King, and was therefore incompetent to testify. The Record also shows that all of these objections were overruled except in respect to the deposition of Rachael King—and that the parties agreed, that upon the hearing of this cause before the Supreme Court at January term, 1859, the record on file in that court, should be used as far as applicable, so as to save necessity of obtaining another copy.

Upon enquiry during the term of the court, the record referred to could not be found—application was then made to the Clerk of the Circuit Court for another copy, and it was then ascertained that the depositions taken in the case of Nicholas King against the heirs of Wm. and Joseph King composing a part of the record, and to which the objections applied, could not be found, and further, that those depositions were not on file in October, 1858, where the decree now complained of was renewed.

The case being thus situated, Mr. Smith, for Wade and others, agreed before this court, that the depositions referred to were not on file at the time the decree was entered, and that they could not now be found; that defendant, Thomas, was not present when the decree was entered, but had, before the entry thereof, given written directions in regard to it, supposing that the depositions were on file. It was then agreed that the cause should be heard upon the record as it was, unless the depositions could be found, in which case they were to be used, upon this understanding which it is believed was entered on the record, or on the docket of the Chief Justice. Mr. Smith argued the cause for defendants—the errors assigned are—

First, The Court erred in permitting the record of the suit of Nicholas King against the heirs of William and Joseph King to be used as evidence in the cause.

Second, The Court erred in permitting the Report of the master in Chancery, made and filed in the case of Nicholas King against John C. Hamilton, administrator, and the heirs of W. & J. King, to be used as evidence in the cause, and also in permitting the decree in said case to be used as evidence in said cause.

Third, The Court erred in entering a decree in favor of the complainants for any part of the proceeds of the Iowa lands, there being no testimony proving that any of the money of the said complainants was ever used in purchasing said lands.

Fourth, The Court erred in decreeing anything due the complainants and not dismissing the bill.

The present Record contains:—

1. The Bill in Chancery.
2. The Master's Third Report.
3. The account receipted by Peters, referred to in the bill and Master's report.
4. The decree of N. King, of October, 1855.
5. The agreement of Kings as to their interest in the lands purchased in name of N. King.
6. The Will of Joseph King.
7. The sums in chancery.
8. Answer of John Peter.
9. Answer of G. C. King, jr. and others.
10. Decree of October, 1858, and exceptions.
11. Replicatons to answers.
12. Deposition of John Peter.
13. Deposition of Berdan.
14. The Bill filed by N. King.

The Record as now presented to the Court, and upon which the case must be decided, does not contain any of the testimony or depositions taken in the case of N. King against the Representatives of William and Joseph King, for the exclusion of which evidence the decree of the Circuit Court was reversed at the last term of this Court.

The Appellants contend—

First, That by the decree of October, 1855, the rights of all the parties, to that suit, were settled, and that said parties are concluded, in respect to all questions so far as dependant on that suit, then adjudicated by the court; errors in that decree, in respect to law or facts, can only be corrected by the Supreme Court. The saving or reservation in the decree, places the complainants in the same position that they would have occupied if no suit had been brought, or decree entered. *I. Greenleaf*, p. 596, note 2, p. 593. See 528, *Gilston vs. Codwire & Johnson*, chancery 193. *Jones vs. Smith* 13 Ill. R. 304. *Godoy vs. Naylor* 20 Ill. R. 415.

Second, That no one of the parties can go into an enquiry as to the reasons on which the Court acted in making the decree, nor can they show, that upon the facts before the Court, the decree should have been different, except upon errors alleged before the Supreme Court. *Buckmaster vs. Ryder* 12 Ill. R. 211. *Forquies vs. Forquies* 19 Ill. R. 71.

Third, But for the reservation or saving of the rights of the complainants in this cause, they would have no other remedy than by appeal or writ of error. By that reservation their right to sue for, and recover the one-fifth, if entitled to it, is fully protected. *Buckmaster vs. Ryder* 12 Ill. R. 211.

Fourth, Acting upon the correctness of the foregoing propositions, the complainants have filed this bill, asserting their right to one-fifth of the Iowa lands, or the proceeds of the sale thereof. And the only question presented is, have they any right to said lands?

They charge that they are entitled to the said one-fifth because of the investment of their funds to that extent in its purchase, and this is the only ground on which they can rightfully or legally assert their claim. This charge is positively denied by the answers, and the record furnishes no evidence of its truth. Upon this view of the case, there can be no pretense of right to recover. But the complainants seek a recovery upon the ground that, by the opinion of the Supreme Court in the case of *N. King*, (16 Illinois Reports 190) they are entitled to a recovery, and they insist that this opinion of the court is binding and conclusive in the premises. Although the record offered in evidence (not including the depositions,) would be received, to prove itself, and prove what was decided or decreed, yet not to prove that the funds of complainants or their ancestor, were invested in the purchase of the lands, nor that complainants are entitled to one-fifth of the proceeds of the sale. The final decree, which settled the rights of the parties in that suit, proves that they were not so entitled. And the decree was inadmissible as evidence, for any other purpose than as above stated, if for no other reason because it was obtained upon the testimony in part of *Rachael King*, who was an incompetent witness. *Joseph King* died in 1843; the Iowa land was purchased in 1846.

The appellants contend further—

First, That whatever might have been the duty of the Court, or whatever might have been the rights of the parties under the opinion of this Court, as reported in 16th Ill. 190, when that opinion was filed, the decree entered in October, 1855, concludes and binds the parties to that suit, (and, as before stated, the complainants acting upon this view of the law, have filed this bill, with a view to show they are entitled to the net proceeds of the sale of one-fifth of the lands, and this they do after the sale, and after it is known that the one-fifth exceeds the amount of indebtedness of *Joseph King* to *Nicholas King*.)

Second, That to entitle the complainants to a decree in this cause, they must prove that their money, or that of their ancestor was used in purchasing said land.

Third, The written or printed opinion of the Supreme Court, predicated upon evidence not now before the Court, cannot be allowed to stand in the place of the evidence, nor to supply evidence sustaining the decree. It is the final judgment or decree in a cause which binds and concludes. *I. Greenleaf* p. 523-4 Sec. 528-9.

Fourth, The record of the cause, if evidence against must be evidence for the Appellants, and this proves that complainants are not entitled to any relief. *I. Greenleaf* Sec. 528-9. 2 *Starkin* side page 221.

5. As the complainants have made their case, and as it now stands before the court, they have no right to recover unless the evidence, sustains their claim—they are not concluded by the record, because of the reservation,—but the record as it is, disproves their right to recover, and they must rely upon other evidence.

6. The opinion and judgment of the Supreme Court of the January Term 1859, settles the question that the despositions regularly taken in the case of Nicholas King, are evidence in this case, but it is not decided or intimated that the record or decree or the report of the master in chancery are admissible.

7. But assuming that the report of the master in chancery, is admissible as evidence, the court will see by looking at that report, that Joseph King had received his full proportion of the proceeds of all the sales of the Morgan county lands, at the time of the purchase of the Iowa lands, and that his heirs had no money in the hands of William King at the time he made these purchases, nor at any time afterwards.

The appellants contend further :

1. That this court cannot, in this proceeding inquire into, or change the decree entered in October 1855. Upon proof of the allegation that the land was purchased with their money they may recover, but they cannot in this proceeding reverse or change that decree.

2. That whatever may have been the proper remedy of the complainants or the proper mode of proceeding to enforce that remedy,—are questions not now before the court, they have filed their bill, as they had the right to do, asserting their right to one-fifth of the land in controversy upon the ground of the investment of their funds, and the court cannot aid them without proof of such investment.

3. The questions now presented, are not, what this, or that court may have said, or even decided in regard to complainants rights, upon a given, or supposed state of facts, but what are their rights upon the facts now before the court.

4. The appellants have heretofore and still do, contend, that upon the pleadings in the case of Nicholas King, no questions was presented, or could be decided in respect to the land, except as to the right of three-fifths thereof. It was nowhere alleged, that Joseph King's heirs had any interest in that land. They claimed no interest.

5. The court cannot decide this case for complainants except upon one of two grounds,

1. That it is competent for a party to file a bill in chancery to correct a former decree by showing, that the court acted erroneously, or upon a supposed state of facts which did not exist.

2. That complainants rights have not been adjudicated, the first presents a question of law, and the second a question of fact, to whether funds of Joseph King or his heirs were used in the

... term, it was expected, that the court would decide the ... and effect of the decree of October 1855 as evidence, and that if the decision was, that the complainant could in this form of proceeding obtain a reversal, or change of that decree, the question would then arise upon the testimony whether or not as matter of fact, the allegation of the investment of complainants funds in the Iowa lands had been proven, but the court, thinking, most probably, that the circuit court should first pass upon the testimony, confined its opinion to the simple point of admissibility. That question being determined, it now remains for the court to decide the other. It was believed and contended, that upon the facts then before the court, the complainant had no right to recover.

In the view of the counsel, the complainants and their case, stand precisely in the position which they would have occupied, if no decree had ever been made in favor of Nicholas King, nor no suit brought of him, they claim one-fifth of the Iowa lands, upon the ground of the investment of their funds in its purchase, their right is contested, and the facts charged are denied, to recover, they must sustain by evidence, the truth of this allegation.

The charges of fraud against the guardian and attorney of W. King's children, in obtaining the decree of 1855, is not only answered, but disproved by the admitted facts in the record. Nothing was done, or intended to be done, to prevent the complainants from showing their right to one-fifth of the lands in controversy, whenever they might think proper to do so.

They have, by the advice of counsel, brought this suit, and no attempt has been made to use the decree obtained to their prejudice.

LOGAN & LINCOLN, For Appellants.

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abstract