

No. 14781

Supreme Court of Illinois

Dunning et al

vs.

Dunning et al

(Opinion by Breese)

71641  7

delivered the opinion of the Court.

Mr. Justice Reese & This was a motion in the Circuit Court of Rogers County, to set aside a Sale on Partition and all the orders made in the Cause. ~~Written verbatim as aforesaid, for the Court.~~

The Suit was for the partition of the land of Eben Manning, and filed by his heirs at law against the widow and the other heirs at law. The defendants duly appeared and filed their answers to the petition, and such proceedings were thereupon had, that the Court decreed a partition of the land, and ~~ordered~~ ^{appointed} the widows and appointed Commissioners for that purpose with directions to set off the widows dower in the land. At the same term the Commissioners reported the land ^{without prejudice to the owners,} could not be divided, whereupon an order was made for a sale of the land and a jury was empanelled to enquire of the yearly value of the widows dower, and to allot the same to her, instead of a portion of the land. The jury ascertained the yearly value of the dower at two hundred and twenty five dollars. A sale was made by the Master in Chancery of the land, subject to this allotment to the widow, which was approved by the Court.

A motion was made to set aside all these proceedings, which the Court denied.

Many reasons were assigned a ground
of the motion, all which, it is not necessary
to notice. The one most important is the first.
That the petition was not sworn to as the statute
requires. This ^{objection} would have prevailed, doubtless,
if made at the outset, and before answer filed.
After a regular appearance by attorney, answer
filed, decree had and a lab of the primary,
and the report thereof appeared, this ~~objection~~
~~various~~ objection comes too late. It is, at
most, but a dilatory motion, and must be
made in apt time, ^{which is} at the earliest moment.

As to the second point, process is unnecessary
in any case, where the party voluntarily appears
and pleads. Process could do no more than
compel ~~this~~ appearance, and the purpose is
answered if the ^{party} comes voluntarily into Court.
But it is said, the attorney who appeared for the
defendants, and put in the answer to the
petition, has no such authority. On this
point there are several affidavits, ^{and} the
weight of testimony contained in them, greatly
preponderates in favor of the right of the
attorney to enter an appearance and file
an answer. It seemed to be an amicable
proceeding between all the parties interested,
this is part of the third objection. As to the

Fourth, there is no law with which we are familiar, requiring the findings of a Circuit Court to sign a decree which he directs the clerk to enter. The entry of the decree on the record gives it its validity.

As to the fifth objection, ^{that plaintiff was a non-resident and filed no costs bond, if correct,} ~~it comes~~ too late, ~~is a dilatory motion~~ ^{is a dilatory motion} answering to the point. It is a dilatory motion, and if not interposed at the proper time, will be considered as waived. The objection cannot be made after answer or plea filed. Foster v. School, in Walter, 12 Th. 154.

It is unnecessary to ^{set} up ^{the} ~~points~~ ⁱⁿ detail, but will come to the ~~eleventh~~ ^{eleventh} which seems to present the gist of the controversy. It is this. "Because the land were sold for one half their value". Some of the affidavits show that there was any unfairness at the sale. This admitted by all, that the whole proceeding was regular, and the sale had in the presence of two of the defendants and their attorneys, and no objections made. The evidence is quite strong, that both the party in embrace of two hundred and twenty five dollars on the land, in favor

the widow, fifteen dollars per acre was a
full price for the land.

But an insuperable objection to
allowing the motion, is, that the purchaser
of the land had no notice of the motion.
He was a party in silent and entitled
to notice. Nor could the Court on the
motion to set aside the sale, look into
any irregularities preceding the sale.

There being then a ratification by the
defendants of the act of the attorneys,
Raff and Kinney, if not ^{implied} original
authority to enter their appearance, and
the Court having ^{thus} jurisdiction of the
defendants, we so hold full authority
on this motion, to go back of the date
of sale. ~~The motion is granted~~
~~the motion is granted~~

~~Indisputable~~

On the merits of the controversy, the whole case
shows that the mortgage for purchase and for an
allowance to the widow, ^{was} ~~was~~ of that amicable
character at the start,
exaggerated, for which often entered into, but
which sometimes terminate in this way, in an
expensive law suit.

The judgment, on the motion, must be affirmed.
Indisputable

45 - 32

Dunning et al.
vs
Dunning et al.

Opinion by
Pres. J.

14 781

C.R.

Recorded Book 12
Page 434.