

No. 12830

Supreme Court of Illinois

Prieto, et al.

vs.

Duncan.

71641  7

128

Sarah Ann Pritchard
et al, vs
John Duncan

128

12830

1859

[Faint, illegible handwritten text]

1 State of Illinois

LaSalle County vs Phase Upon the Removall Hearing
E. Hollister Circuit Judge for the
South Judicial District in and for said State
and the Presiding Judge of the LaSalle County Circuit
Court, at a term of said Court commenced and
held at the Court house in Ottawa in the first
Monday in the month of November, the same
being the first day of November in the year of our
Lord one thousand eight hundred and fifty eight
and of the United States of America the eighty
third.

Present

The Honorable Madam E. Hollister Presiding Judge
John A. Ash Clerk
Washington Bushnell Master at Law
Eli L. Waterman Sheriff

Be it remembered that on the 11th day of
August 1858 a certain bill in chancery was
filed in the office of the Clerk of the Circuit Court
of said County in the words and figures following
to wit;

"To the Honorable M. E. Hollister, the Judge
of the Circuit Court within and for the County of
LaSalle in the South Judicial District of the
State of Illinois in Chancery sitting.

2 Respectfully Represents unto your Honor, your Orator
John Duncan of the County of LaSalle State of
Illinois on or about the Eighteenth day of September
AD 1855 one William Whaley, since deceased and
Sarah Ann Whaley his wife, now Sarah Ann Prieto
wife of Joseph A. Prieto of the County of LaSalle
State of Illinois executed a Mortgage to your
Orator in fee Simple upon the following described
real Estate situated in the City of La Salle
in said County of LaSalle to wit;

Lots Number Four and Five (4th & 5th) in Block
one hundred and forty (140) and which Mortgage
- in the words and figures following to wit

This Indenture made this Eighteenth day of
September in the year of our Lord One thousand
Eight Hundred and fifty five between William
Whaley and Sarah Ann his wife of the County of
LaSalle and State of Illinois parties of the first
part and John Duncan of the County of LaSalle
in the State of Illinois party of the second
part. Witnesseth that the said parties of the
first part for and in consideration of the sum
one thousand five hundred Dollars to them paid
by the said party of the second part, the receipt
of which is hereby acknowledged do - by these presents
Grant, Bargain and Sell unto the said party
of the second part his heirs and assigns

3. The following described Tract or Parcel of Land situated in the County of LaSalle and State of Illinois viz: Lots four and five (4 & 5) Block No. one hundred and forty (140) in the City of LaSalle, Together with all and singular the here- detaments and appurtenances therunto belonging or in any anywise appertaining; to have and to hold the said premises as above described with the appurtenances unto the said party of the second part his heirs and assigns forever.

And the said parties of the first part for themselves, their heirs, executors and administrators do hereby covenant to and with the said party of the second part his heirs and assigns that they are well seized of the premises above conveyed, as of a good and indefeasible estate in fee simple and have good right to sell and convey the same in manner and form as aforesaid;

that they are free from all incumbrance; and that the above bargained premises, in the quiet and peaceable possession of the said party of the second part his heirs or assigns against the claim of all persons whomsoever they well forever warrant and defend.

Provided, Nevertheless, that if the said parties of the first part, their heirs, executors or administrators, shall well and truly pay the said party of the second part, his heirs, executors, administrators

For assigns the just and full sum of One thousand
Six hundred and ten dollars and forty cents
on or before the seventeenth day of September Eight-
een hundred and fifty six then this deed
as also a certain promissory note bearing
even date with this indenture, given by the said
party of the first part, viz William Whaley, to the
said party of the second part conditioned to pay
the said sum of ^{one} thousand six hundred and ten
dollars and forty cents at the time aforesaid
shall be void otherwise to remain in full force and
virtue.

In testimony whereof the said parties
of the first part have set their hands and seals
the day and year first above written.

Signed, sealed and delivered } William Whaley Esq
in presence of } Sarah ^{her} Whaley Esq
S. J. Greenwood

State of Illinois }
LaSalle County }
On this Eighteenth day
of September 1855 personally
appeared before me a justice
of the peace in and for said county William
Whaley to me personally known to be the person
whose name is subscribed to the above deed as
having executed the same and acknowledged
that he had freely executed the same for the
uses and purposes therein expressed and the

5 wife of the said William Whaley to me personally known to be the person whose name is Subscribed to the same deed also appeared before me, and was by me made acquainted with the contents of the same and examined separately and apart from her said husband whether she executes the said deed and relinquished her dower in the lands and tenements therein mentioned voluntarily freely and without compulsion of her said husband and acknowledged that she executed the same and relinquished her dower in the lands and tenements therein mentioned, voluntarily and freely and without the compulsion of her said husband.

Given under my hand and seal the day and year aforesaid.

(Signed) Nicholas Duncan J. P.

Which mortgage bearing date the day and year last aforesaid was executed as aforesaid in order to secure the payment of a certain promissory note of the said William Whaley of even date with the said mortgage for the sum of sixteen hundred and two and 40/100 Dollars, payable with interest thereon after maturity at the rate of ten per cent per annum, to your Orator on or before the fourteenth day of September One

One Thousand Eight Hundred and fifty Six, which said note is in the words and figures following, viz:

\$1810, 40

On or before The Seventeenth day of September A.D. One Thousand Eight Hundred and fifty Six, for value received, I promise to pay John Duncan or order the sum of One Thousand Six Hundred and two dollars and forty cents, with interest after maturity at the rate of two per cent per annum being for cash loaned.

La Salle Illinois September 18th 1853

Witness

Signed

W^m Whaley

D. J. Greenwood.

And your Orator further represents that the said sum of Sixteen hundred and two and 40/100 Dollars was not paid to your Orator at the time limited in said mortgage, and that thereby the estate of your Orator in said mortgaged premises became absolute at Law.

Your orator further represents that on or about the fifteenth day of January A.D. 1857 the said William Whaley departed this life leaving no children but the following persons his heirs and next of kin Sarah Ann Whaley his widow, Sarah Ann Prieto Late, now wife of Joseph A. Prieto of said County of LaSalle, John Whaley, Peter Whaley, Isaac Whaley and George Whaley his brother, and Sally Whaley widow of Thomas

Whaley deceased a brother of said William Whaley
deceased. And your Orator further represents
that the said Sum of Sixteen hundred and ten
and ⁴⁰/₁₀₀ Dollars together with a considerable ar-
-rears of interest accrued thereon is now due to
your orator on the security of the said premises
and that your Orator hath frequently and in a
friendly manner applied to the said William
Whaley in his life time, and since the decease
of the said William Whaley to the said Sarah
Ann Prieto, Joseph A. Prieto, John Whaley,
Peter Whaley, Isaac Whaley, George Whaley and
Sally Whaley, and requested them to pay the same
or to release their equity of redemption in said
Mortgaged premises, which they refused to do.

Your Orator therefore prays for process of Subpoena
against the said Sarah Ann Prieto, Joseph
A. Prieto, John Whaley, Peter Whaley, Isaac
Whaley, George Whaley and Sally Whaley widow
of Thomas Whaley deceased that they and each
of them may be made parties defendants to
this your Orators bill and that they may re-
spectively in their corporal oaths to the best
and utmost of their Knowledge, Remembrance
information and belief, full, true, direct, and
perfect answers make to all and singular
the matters aforesaid, and that an account
may be taken under the direction and decree

Of this Honorable Court of what is due to your
orator upon the said mortgage, and that the
said Sarah Ann Prieto and Joseph A. Prieto
Peter Whaley, John Whaley, ~~John Whaley~~,
George Whaley and Isaac Whaley and
Sally Whaley may be decreed to pay unto
you ~~unto~~ your orator what shall thus appear
to be due; with the cost of this suit by a short
day to be appointed by this Honorable Court.

Your Orator being ready and willing and
and hereby offering in being paid his said
money and interest and costs, at such ap-
pointed time to reconvey said mortgaged
premises, to the said Sarah Ann Prieto, Joseph
A. Prieto, John Whaley, Peter Whaley, Isaac
Whaley, George Whaley and Sally Whaley as
this Honorable Court shall direct and in
default of such payment that the said
Sarah Ann Prieto, Joseph A. Prieto, John
Whaley, Peter Whaley, Isaac Whaley, George
Whaley and Sally Whaley and all persons
claiming under them may be absolutely barred
and foreclosed of and from all right and equity
of redemption in and to said mortgaged premises
and may deliver up to your orator all and
every such deeds, evidences and writings
in their possession, custody or power relating

To said mortgaged premises as your orator ought to have; and that your orator may have such other further relief in the premises as to your Honor shall seem meet and equity, and good conscience shall require and your orator will ever pray &c

Strain & Bull

Solicitors for Complainant

On the same day, to wit: The 11th day of August AD 1858, the complainant, by his Solicitor, files a precept and affidavit of non-residence in the words and figure following; to wit:

"State of Illinois } Circuit Court for said County
LaSalle County } do November Term AD 1858.

John Duncan }

vs

In Chancery - Bill to fore close

Sarah Ann Prieto }

Mortgage

Joseph A. Prieto John Whaley, Peter Whaley,
Isaac Whaley, George Whaley and Sally Whaley.

John F. Clark Esq.

Please issue as above and

oblige

Strain & Bull

Solrs. Compt

John Duncan }

vs

LaSalle Circuit Court

Sarah Ann Prieto et al }

Bill to fore close

10 James Strain one of the Solicitors of the above named complainant being first duly sworn according to law, on oath deposes and says that John Whaley, Peter Whaley, Isaac Whaley, George Whaley and Sally Whaley, Defendants in the above entitled suit, are not residents of the State of Illinois as he verily believes.

Subscribed & sworn to before me ^{James Strain}
this 10th day of August AD 3

1888. Witnesses my hand & notarial Seal

E. Follett Bull

Notary Public "

And afterwards, to wit: on the ~~10~~⁵th day of August ~~AD~~ 1888 a summons was issued by the Clerk of said Circuit Court, in the words and figures following, viz:

" State of Illinois }
LaSalle County } of Illinois; The People of the State

Do the Sheriff
of LaSalle County Greeting: We command
you to summon Sarah Ann Prieto, Joseph A.
Prieto, John Whaley, Peter Whaley, Isaac
Whaley, George Whaley and Sally ~~Ann~~ Whaley
if to be found in your county, personally to
be and appear before the Circuit Court

11 of said County, on the first day of the next term thereof, to be holden at the Court House in Ottawa, on the 1st day of November next, to answer to a certain Bill of complaint filed in our said Circuit Court on the Chancery side thereof, against them by John Durcan and have you then and there this writ and make return thereon in what manner you execute the same.

Witness John F. Nash, clerk of said Court, and the Seal of said Court, at Ottawa this 11th day of August A.D. 1858

J. F. Nash Clerk,

And afterwards to wit, on the 27th day of October 1858 said Summons was returned by the Sheriff of LaSalle County, with two endorsements thereon, in the words and figures following - to wit:

"Served by reading this Summons to Joseph A. Prieto and delivering to him a true copy thereof, also left with him a copy of this writ for Sarah Ann Prieto wife of said Joseph A. Prieto at her place of residence, informing him of the contents thereof, said Joseph being a white person above the age of 18 years

1st Sept 1st 1858. fees = S^{er}vt. 1.10
 14. miles 70
 2 copies 100
 \$ 2.80

E. L. Waterman Shff
 A. E. Grow Spty.

John Whaley, Peter Whaley, Isaac Whaley,
 George Whaley, and Sally Whaley not found
 in this County. E. L. Waterman Shff
 Oct 18th 1858. A. E. Grow Spty.

And afterwards to wit; on Monday November 15,
 1858 the same being one of the days of the
 November term of said Court for said fees a
 certain matter was returned of record in the
 said and figures following to wit;

John Duncan vs Bell to foreclose Mortgage
 Sarah Ann Prieto
 Joseph A. Prieto John Whaley, Peter Whaley,
 Isaac Whaley, George Whaley and Sally Whaley.
 This day the complainant comes by
 Strain & Bull his Solicitors, and makes proof
 of publication, to the non-resident defendants
 of the pendency of this suit by a notice and

publishers certificate in the words & figures following to wit:

State of Illinois³⁵⁸. And Circuit Court
La Salle County³ thereof - To November
Term 1858.

John Duncaw, vs. Sarah Ann Prieto, Joseph A. Prieto, John Whaley, Peter Whaley, Isaac Whaley, George Whaley and Sally Whaley. = Bill To foreclose Mortgage.

It appearing from an affidavit on file in the office of the Clerk of the Circuit Court of said County, that the above named John Whaley, Peter Whaley, Isaac Whaley, George Whaley, and Sally Whaley, are not residents of this State, and the Complainant having filed his bill of complaint therein, and Summons having issued thereon according to law, Now therefore, notice is hereby given you, the said non-residents, that unless you and each of you shall personally be and appear before said Court, on the first day of the next Term thereof, to be holden in Ottawa, on the first Monday in the month of November next, and plead, demur, except to or answer, said bill, the same will be taken pro confesso against you by default, and the matters and things therein prayed for, decreed accordingly.

Aug 14. 1858

J. F. Nash Clerk

Strain & Bull solicitors for complainants.

124 State of Illinois } The undersigned, Printer and
LaSalle County } Publishers of the "Ottawa
Republican" a weekly news-
paper of general circulation, published at
Ottawa, LaSalle County, State of Illinois,
hereby Certifies that the annexed Notice, of
foreclosure of Mortgage, John Duncan. vs.
Sarah Ann Prieto et al. was published in said
paper 6 successive weeks, commencing
with the number of said Paper published on
the 14th day of August A.D. 1858. and ending
with the number of said paper published on the
18th day of September A.D. 1858.
Publishers fees \$3.00. Knappton & Buffington

And now on Motion of Complainants Solicitors
the defendants are ruled to file their answer herein
on or before Monday morning of the fourth
week of the present term of this Court. "

And afterwards to wit: On the 23^d day of
November, the same being one of the days
of the November Term of said Court for the
year 1858. the Master in Chancery filed
his report in this case in the words and
figures following to wit:

La Salle Circuit Court -
November Term 1858. = In Chancery.

13 John Duncan

vs

Bill to foreclose Mortgage

Sarah Ann Prieto

Joseph W. Prieto, John Whaley, Peter Whaley,
Isaac Whaley George Whaley and Sally Whaley.

To the Hon. W. C. Hollister, Judge &c

The undersigned, Master in Chancery, to whom
said cause was referred, to compute the amount
due on the Mortgage debt, mentioned in said
bill, would respectfully report, that from
an Examination and inspection of the original
note & mortgage in said bill mentioned there
appears to be due thereon for principal and
interest thereon, up to the date of this report
according to the tenor and effect of said
note, the sum of, nineteen hundred and Sixty
two dollars (\$1962.00) as follows.

Principal

\$1610.40.

Int at 10 per ct from Sept 17 1856 to date.

351.60

Nov 23. 1858

Amount

\$1962.00

Master's fee \$3.00.

Respectfully Submitted

W. C. L. Wallace

Master in Chancery

And afterwards to wit; on the same (23rd) day
of November an order was entered of record in
this cause, in the words & figures following, to wit;

14th John Duncan

vs

Bill to foreclose Mortgage

Sarah Ann Prieto

Joseph A. Prieto John Whaley, Peter Whaley
Isaac Whaley, George Whaley & Sally Whaley

This day the complainant again comes by Strain & Bull his Solicitors, and the defendants being each, three times solemnly called in open Court come not, nor anyone for them but make default.

Under it appearing to the Court that a summons has been issued and returned by the Sheriff of La Salle County duly served on the defendants, Sarah Ann Prieto, and Joseph A. Prieto, and that the non-resident defendants, John Whaley, Peter Whaley, Isaac Whaley, George Whaley & Sally Whaley could not be found, and also that the defendants are in default of answers, on motion of complainants Solicitors it is ordered by the Court, that the bill herein be taken pro confesso against said defendants by default for want of answers, and that this cause be referred to the Master in Chancery, to compute the amount due on the mortgage and report the same to this Court.

This day, ^{when} again comes the said complainant,

17-
out by Strain & Bull his Solicitors and the said
defendants alone named and each of them
still failing to plead, answer, except or demur
to the complainants Bill herein and the said
defendants alone named, and each of them
having been by the Court three times solemnly
called came not but made default. It is there-
fore ordered, adjudged and decreed by the
Court that the said complainant Bill & and
the several matters and things therein set forth
be taken pro confesso, as against the said de-
fendants and each of them, and that this
cause be referred to W. H. L. Wallace Esq.
Master in Chancery of this Court to report
to the Court the amount of money, due to
the said complainant by way of principal
and interest on the security of said mortgage
premises, and now again comes the said com-
plainant by Strain & Bull his Solicitors,
and produces to the Court the Report of W. H.
L. Wallace Esq. Master in Chancery of the Court,
which report is hereby ratified and approved
by the Court and ordered to be filed, on consid-
eration whereof the Court do find the equity of
the case to be with the said complainant, and
that there is due to the said complainant
by way of principal and interest on the

18th note and mortgage mentioned in said Com-
plainant. Bill the Sum of nineteen hundred
and Sixty two dollars. (\$1962,)

It is therefore ordered, adjudged and decreed
by the Court, that the said defendants, pay
to the said Complainant the said Sum of
nineteen hundred and Sixty two dollars (\$1962⁰⁰)
and interest thereon at the rate of six Per
Cent, from the date hereof, within ten days
from the rising of this Court; and in default
thereof it ~~is~~ ordered that W. H. L. Wallace
Master in Chancery of this Court, proceed
to sell the said premises as upon judgments
and executions at law, that out of the proceeds
of such sale he pay 1st the costs of this
proceeding to be taxed; 2nd that he pay
to the said Complainant the amount so
due to him and the interest thereon, and 3rd
that he bring the surplus (if any) into Court
to be paid to the defendants according to
their rights in the premises respectively.

And it is further ordered that in case said
mortgage premises shall not sell for enough
to satisfy and pay this decree and costs, that
execution issue against the estate and effects
of said defendant as upon judgments at
law. And it is further ordered that the said

17 Master report his proceedings in the premises
to the next term of this Court, to which time
this cause stands continued "

And afterwards to wit; ^{Wednesday} on December 8th the
same being one of the days of the said November
Term of said Court, a Supplemental decree
was entered of Record in said cause in
the words and figures following, to wit:

John Duncan
vs Bell to foreclose Mortgage
Sarah Ann Prieto
Joseph A. Prieto John Whaley, Peter Whaley,
Isaac Whaley, George Whaley, & Sally Whaley

And again comes the said
complainant by Strain & Ball his solicitors
and on their motion, it is ordered that the
continuance of this cause be set aside, and
on consideration of the decree of the Court
herin made at the present term thereof,
it is ordered, adjudged and decreed
by the Court, that said decree be so modi-
fied and reformed, that instead of execution
issuing against the defendants for any
unsatisfied balance after the sale of the
said mortgaged premises as provided in
said decree, the same shall be satisfied

20 ~~#~~ in due course of the administration of the estate
of said William Whaley deceased; and that
this cause be continued as in and by said
former decree is ordered. "

And afterwards to wit, on Saturday, February
12th 1859 the same being one of the days
of the February Term of Said Court. for
the year 1859, the report of Sale in this
case, and the final order of the Court
were entered of record in the words and
figures, following, to wit:

" John Duncan }
vs } Bill to foreclose mortgage
Sarah Ann Prieto }
Joseph A. Prieto, John Whaley, Peter
Whaley, Isaac Whaley, George Whaley
and Sally Whaley.

This day the com-
plainant comes by Strain & Bull his
Solicitors and presents to the Court the
Master's report of Sale, ^{in this cause,} which is in
the words and
figures following, to wit:

La Salle Circuit Court - in Chancery

21 # John Dineen }
as } Executor of Mortgage
Sarah Ann Prieto }
Joseph A. Prieto, John Whaley, Peter Whaley,
Isaac Whaley, George Whaley & Sally Whaley.
To the Hon M. C. Hollister Judge of
said Court,

The undersigned Master in chancery
who was directed by the decree entered in
said cause at the November Term AD 1858
of said Court to make sale of the premises
hereinafter mentioned would Respectfully
report, that in conformity with said decree
I gave notice by posting up written
~~and posting up written~~ and printed notices
in three public places in said County,
and by publication in the Ottawa Repub-
lican a weekly newspaper for three weeks
prior to the day of sale hereinafter
mentioned, that I should in conform-
ity with said decree sell said premises
to wit: Lots four (4) and five (5)
in Block One Hundred and forty (140)
in the City of Lubec in said County
at Public Auction at the door of the
Court House in Ottawa in said County
on Tuesday the 25th day of January

22^d A.D. 1859. between the hours of Nine o'clock
in the forenoon and Sunset of said
day, to the highest bidder for cash -
which notices were so posted and pub-
lished for three weeks immediately
preceeding said day of Sale, and con-
tained a statement of the parties to
this suit, a description of said premises
and the time and place & terms of said
Sale - And on the said 20th day of
January A.D. 1859, at the hour of three
o'clock in the afternoon of said day
I did offer said premises for sale at
Public Auction at the door of the
Court House in Ottawa in said County.

And E. J. Ollett Bull then and there
bid for said Lot four (4) in Block 140,
the Sum of One thousand dollars and
said complainant John Duncan bid for
Lot five (5) in Block 140, the Sum of
one thousand and forty two dollars
and fifteen cents (\$1042.15) and the said
Bull and Duncan being then and there
the highest bidders, the said premises
were by me then and there respectively
struck off and sold to the said Bull
& Duncan, at the prices so respectively

23 hidden by them as aforesaid - And I
executed and delivered to said E. Fillett
Ball & John Duncan certificates of said
purchase for said lots so purchased by
them allowing fifteen months for redemption
according to Law.

No money was paid me on said
Sale except the sum of Sixty dollars and
fifty three cents (\$60.53) being the amount
of the costs of this proceeding & the costs
of advertising and making said Sale.

The balance of said bids were applied by
Complainant & said Ball who was one
of his Solicitors in said cause, in satis-
faction of said decree and interest - & they
satisfy the same.

Respectfully Submitted

Jan 25 1859

W. H. L. Wallace

Master in Chancery

After reading and filing said Master's report, on motion
of Complainant's Solicitors, it is ordered adjudged
& decreed by the Court, that the same and
all things therein contained, be ratified,
approved & confirmed and that the same
be held firm and effectual in all things
forever."

State of Illinois 3 I John H. Stark Clerk of the
Sasale County 3 Circuit Court in and for
said County and State do hereby
certify that the above and foregoing comprises
a true full perfect and complete record of
all the orders of Court and all the papers on
file in the above entitled cause and that
the same now appear on file and of record
in my office.

In Testimony Whereof I have hereunto set
my hand and the Seal of said Court at
Ottawa this 7th day of March 1889
J. H. Stark Clerk

Sarah Ann Pickett
& others

vs The Supreme Court
20 April Term AD 1839

John Duncan

And now come the
said appellants & say that in the records &
proceedings & rendition of judgment aforesaid
there is error in that behalf.

The Court below erred in rendering judgment
by default against defendant Sarah Ann
Pickett, there being no legal service of process upon
her

D. L. Stoughton
Attys for appellants

And now comes the said defendant in
error and says there is not any
such error in the foregoing record as
is alleged by the said Plaintiff in
error - and he prays that the record
aforesaid may be affirmed.

Stearns & Prall
Attys for Def. in Error

Sarah Ann Peto
vs 128
John Duncan
Transcript

Filed March 8, 1837
L. Leland
Clerk

Recd \$6.50
Paid by D. L. H. H. H.

Sarah Ann. Pict. et al } State of Illinois
vs } Supreme Court - 3rd District
John Duncan } April Term AD 1859

And now again come the said plaintiffs in
error, & by leave of the Court first obtained, assign
the following additional error in the record & proceedings
& rendition of the decree aforesaid - to wit -

1st The Court erred in rendering said decree
because there is an averment in the bill that defendant
Sarah Ann. Pict. (late Sarah Ann Whaley) ever
executed & acknowledged said mortgage in such
manner as to divest her thereof.

2nd The Court erred in rendering said decree because
neither the administrator of the estate of William
Whaley, deceased, or the executor of his last will
& testament, is made party defendant to the bill of complaint.

3rd The Court erred in decreeing that the balance
of the mortgage debt, not satisfied by the sale of
the mortgaged premises, should be paid from the estate
of William Whaley, in and out of administration,
because neither administrator or executor is a party defendant
to the suit.

4th The Court erred in rendering the decree
aforesaid, in manner aforesaid.

D. L. Bough
Attorney for Plaintiff in Error

Senat. Am. Pict. et al.

DA

John Dineen

— " —

Additional assignment

of End.

— " —

Filed Off. 26. 1859.
L. L. L. O. A.

And now comes the fair John
Dineen defendant in error and
says there is not any more error
in said word as above is supposed
and he says that said decree may
be affirmed.

Thain & Bull
Attys Solicitors for
def in error

Preston
vs
Duncan } Error to La Salle

In reply to the argument of the Defendant
in error I make the following points —

Where service of process is made which is other
than a personal service, the law requires, that the
utmost strictness in following the ^{words of the} Statute

Boylan vs Boylan 18th Illinois
in this case the Court say, in making this service
which is constructive, and not personal service,
The requirements of the Statute must be strictly
complied with and this must affirmatively
appear on the record "as no presumptions
can be indulged in against Infants, so
none will be indulged, against adults or
defaults, where the notice has been merely
constructive"

Told by this rule the service in this case
is insufficient, for to make this service
good the Court must presume, that the
husband and wife, were residing together

A decisive objection to this decree
is this.

It is not averred in the bill that
Sarah Ann Preston ever acknowledged

that mortgage so as to divert her right of dower. There is an allegation that she in connection with her husband executed it. but this is not an avowment or an acknowledgment as plain by appears from the language of the Statute which says. "If after the executing thereof such wife shall appear before a judge and acknowledge it"

Principles Statute page 156. Section 17 —

But it is plain that the executing means a signing of the paper in the ordinary acceptation of the words - executing does not include acknowledging

But it is said, that the avowment is found in the statement that she executed a mortgage, in the words and figures following. Then follows the mortgage with a certificate of acknowledgment, but —

1st The certificate of acknowledgment is no part of the mortgage. Consequently, an avowment in relation to the mortgage, does not include the certificate —

2^d The certificate of acknowledgment is no part of the mortgage Record there are no avowments. showing it to be a part of the mortgage or attached thereto. The mere copying certificate in record does not make it a part

Here of

Mc Donald vs Arroun	14	Illinois	58-
Mann " Russell	11	"	586-
Magier " Keon	12	"	380-

The certificate of acknowledgment is totally insufficient. The magistrate does not say that the said Sarah Ann Whaley appeared before him but merely says, "the wife of William Whaley appeared before him."

But says the counsel for the defendant, she describes herself in the mortgage as Sarah Ann Whaley. But we deny that she executed the mortgage at all. Her seeks to make the acknowledgment prove the mortgage and the mortgage prove the acknowledgment— a successful practice of this kind, would qualify a man to get in a basket, and raise himself up by the heels.

There is no proof that Duncan was a justice of the Peace at the time the acknowledgment purports to have been made. and although the Court might take notice that he was - if the question. if the question had been presented to the Court by the introduction of the mortgage. Yet I submit - that there is nothing in this case, that shows that the Circuit Court ever had anything

more than this copy of a certificate, which they
may was contained in the bill before it.
And from that the court could presume
nothing

But it is said the dower of Sarah Ann Trust
is not divested by the decree - It is sufficient
to say in answer, that the decree is for an
absolute sale of the premises, and that she was
a party to the suit -

Pleas

For Plaintiff in answer

128 177
Pautro as Lamer

Reply to def
argument

STATE OF ILLINOIS,
SUPREME COURT,

To the Clerk of the

} ss. The People of the State of Illinois,
Court for the County of La Salle Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between John Duncan

plaintiff, and Sarah Ann Prieto, Joseph A. Prieto, John Whaley, Peter Whaley, Isaac Whaley, George Whaley and Sally Whaley defendant, it is said manifest error hath intervened, to the injury of the aforesaid Defendants

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

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 8th day of March — in the Year of Our Lord one thousand eight hundred and fifty-nine.

L. Deland

Clerk of the Supreme Court.

By J. B. Rice Deputy

128
Sarah Ann Pritto &
others

vs
John Duncan
Writ of Error

Filed March 8, 1859
L. Leland
Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of La Salle Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between John Duncan

plaintiff, and Sarah Ann Prieto, Joseph A. Prieto, John Whaley, Peter Whaley, Isaac Whaley, George Whaley and Sally Whaley

defendants, it is said that manifest error hath intervened, to the injury of the said Defendants

as we are informed by their complaint, _____ the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

John Duncan

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said John Duncan

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 8th day of March in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine.

L. Leland
Clerk of the Supreme Court.
By J. B. Rice Deputy

John Duncan 128
vs

Sarah Ann Prieto
others

Sci' fee

Served this writ by
reading to the willful
named John Duncan this
14th day of April 1859

J. Warner Sheriff
by C. T. Buckley

Send Rt 60
15 miles 75
\$ 135-

Filed April 21 1859
L. Deland
Clerk

D. L. Hough
Att'y at Law

State of Illinois
Supreme Court. April Term
1839.

Sarah Ann Prieto et al
vs } Error to La Salle
John Duncan

This case is submitted
on the part of the defendant in
error on the following argument,

The first error assigned, raises
the question of the sufficiency of
the Sheriff's return as to Sarah
Ann Prieto, upon the ground that
there is nothing to show that her
husband is a member of her family,
although the service was made
by leaving a copy with him, at her
place of residence.

The objection
is so small, it is really hard to an-
swer. but is probably sufficient
to say that in law the husband and
wife are one. his domicile is her
domicile; and conversely her domi-
cile is his. And it is hers because
it is his. Then if they are one in
law and have the same domicile in
law. can there be any doubt that
in law they are members of the same
family?

The absurdity of the objec-
tion was probably felt by the
Counsel for the plaintiffs in error.
when in the argument he was con-

pellect to travel out of the record
so far as to state that his clients
as a matter of fact "sometimes
quarrelled. and some times lived
together. and sometimes they didn't
live together". I suppose in law
that husband and wife are members
of the same family whether they "live
together" or not. At any rate
would not the presumption be
in this case even upon the state-
ment of counsel, that at the ser-
vice was made upon her, by leav-
ing a copy with him, at her place
of residence, ^{it was gone} at one of these times
when they were "living together" —

The second error assigned is, that
there is no allegation in the Bill
that Sarah Ann Prieto ever
executed the mortgage in such way
~~that~~ as to divest her dower.

I insist that it
does contain such allegation. It
states that she, in conjunction with
her husband executed the mort-
gage "in the words and figures follow-
ing". Then the mortgage, together
with the certificate of acknowl-
edgment by the justice, is set out
in hæc verba. and then follows

this statement. "which mortgage bearing date the day and year last aforesaid, was executed as aforesaid" Now the mortgage and acknowledgment being a part of the Bill, if the execution and acknowledgment of the mortgage upon its face appear to be sufficient. Then it follows that the allegation of the Bill is sufficient.

Then the question is, has it been executed and acknowledged in the manner required by the Statute? I answer, substantially it has. It is signed by William Whaley, and Sarah Ann Whaley, and in the body of it imports to be executed by her as his wife. And the justice after certifying to the execution by the husband, goes on to say, without naming Sarah Ann Whaley, ~~her~~ "And the wife of the said William Whaley to me personally known to be the person whose name is subscribed to the same deed, also appeared" &c. The balance of the certificate is in the usual form and refers to William Whaley as "her said husband".

It is not pretended that the statute requires the officer in his certificate to name the wife. And although this is usually done

yet if there is a sufficient identification of the person, is not the object of the law as well attained, without naming her, as if he had named her?

Then can there be any doubt as to the identity of the "Sarah Ann Whaley wife of the late William Whaley" who imports to have signed the mortgage. And "the wife of the late William Whaley" to me personally I know to be the same person whose name appears to the same deed" whom the justice certifies to have acknowledged it. And to have relinquished her dower? No other woman or wife's name appears there. And the Court will not presume that he had more than one wife. And hence there can be no uncertainty or doubt about it.

Another sufficient answer to the objection is this: The decree does not in terms divest the dower of Sarah Ann Pisto. It simply orders a sale of the mortgaged premises. Then if the position taken by counsel for plaintiff in error be true, her right of dower remains undisturbed. And she has no ground of complaint. And the decree should

not be disturbed.

As a set-off to the ~~pliffs~~ Counsel having gone out side of the record in the argument. I may be permitted to state. that during the progress of this cause through the Circuit Court, the defendants Prieto, were represented by their present Counsel D. L. Haugh & H. C. Canon Esq; that they made frequent motions and objections. they were present when the rule for answer was taken. and if I am not mistaken were present when the default was taken. and the judge's docket shows that they were marked as counsel in the case.

The fact is. that the defendants after having stood by in the Circuit Court. without interposing any disclaimer to the Bill. without objecting to the sufficiency of the Sheriffs return. bring this writ of error. for the purpose of delay and of saddling the defendant in error with costs.

As to the China assignment of error. it is sufficient to say that. if the mortgage premises have been sold as the record shows. and that the decree has been satisfied by the sale. and therefore the error.

if it be one, can not by any possibility do the plaintiffs in error any injury. And of which they can not complain, as has been repeatedly decided by this Court.

The record in this cause shows a bona fide indebtedness of something over \$2000. by the property named in the Bill to the complainant; it shows that Whaley who executed the mortgage, died without issue his estate descending to his widow and his brothers and sisters. none of whom are minors: it shows that his widow has again married, & that her husband has been brought into Court with her to protect and defend her rights: it shows a sale of the mortgage premises and a satisfaction in full of the decree - with fifteen months redemption. Now I ask is there enough in the errors assigned to require the Court to reverse the decree, and remand the cause for the purpose of having the Sheriff return that Joseph A. Toriata was a member of the family of his wife? or for the purpose of having the justice insert the name of Whaley's wife in his certificate of her acknowledgment? or for the purpose of

leaving the decree so modified
as not to touch the other property
of the estate of Whaley decd.
When there is no possibility of
such an occurrence taking place?

When substantial justice
has already been done between
the parties. will the Court in view
of the whole case, for any or all
of the errors assigned, reverse
the decree. when the principal
effect of such reversal would
be to delay the defendant in error
in the collection of a just debt. and
to saddle him with costs?

James Mann
of Counsel for
Def't. in Error

Small Ann Prieto
et al
vs 177
John Duncan -

Error to La Salle

Argument on part
of Deft in Error

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Filed May 18. 1889
L. L. Lander
Clerk

Stearns & Bull
for Deft in Error

State of Illinois,--Supreme Court,

TO APRIL TERM, A. D. 1859.

ERROR TO LA SALLE.

SARAH ANN PRIETO ET AL., PLAINTIFFS IN ERROR, VS. JOHN DUNCAN, DEFENDANT IN ERROR.

Abstract of Record.

This was a suit in Chancery, brought to foreclose a mortgage, executed in favor of John Duncan, defendant in error, by William Whaley, in his life time, and Sarah Ann Whaley, his wife, now Sarah Ann Prieto, one of the plaintiffs in error.

Pages 1, 2, 3, 4, 5, 6, 7, 8 & 9.	1st. Bill of Foreclosure.
Pages 9, 10 & 11.	2d. Præcipe—Affidavit of non-residence, and summons.
Pages 11 & 12.	3d. Return of officer on summons.
Pages 12, 13 & 14.	4th. Proof of publication of notice to non-residents and rule to answer.
Page 15.	5th. Report of Master.
Pages 16, 17, 18 & 19.	6th. Decree.
Pages 19 & 20.	7th. Supplemental decree.
Pages 20, 21, 22 & 23.	8th. Master's report of sale.
Page 23.	9th. Master's report approved.
Page 24.	10th. Assignment of errors.

Errors Assigned.

The Court below erred in defaulting defendant, Sarah Ann Prieto, the return of the officer showing no legal service of summons upon her.

D. L. HOUGH, Att'y for Pl'ffs in Error.

Additional Assignment of Errors

1st The Court erred in rendering the decree against Sarah & Prieto late (Sarah & Whaley) the bill containing no averment that she ever executed and acknowledged the mortgage. so as to divest her dower.

2nd The Court erred in rendering said decree because neither Administrator or executor of William Whaley's (over)

deceased. is made party defendant & the bill of
complaint.

3rd The Court erred in decreeing that the balance
of mortgage debt not satisfied by sale of mortgaged
premises, be paid from estate of Wm. Whaley,
in due course of administration or executor is
party defendant.

4th The Court erred in sending the decree against
in rem of deceased.

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Prieto

no

Duncan

Abstract

Filed April 19, 1889

A. Leland

Clerk

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

SARAH ANN PRIETO, et al., }
 ^{vs.}
JOHN DUNCAN. }

PLAINTIFF'S POINTS AND AUTHORITIES.

1st Point. The Court below erred in defaulting defendant, Sarah Ann Prieto, the return of the officer showing no legal service of summons upon her.

2d Point. There is no averment in the bill that Sarah Ann Prieto (late Whaley) ever executed said mortgage in such way as to divest her dower.

3d Point. The decree that the balance of the mortgage debt not satisfied by the sale of the mortgaged premises should be paid from the estate of William Whaley, in due course of administration, was unauthorized, neither administrator or executor being a party to the suit.

D. L. HOUGH,
Attorney for Plaintiff in error.

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Sarah A. Rich et al
vs

John Duncan
— " —

Plffs. vs Defs.

Filed May 13. 1839
L. Leland
Clerk

State of Illinois,--Supreme Court,

TO APRIL TERM, A. D. 1859.

ERROR TO LA SALLE.

SARAH ANN PRIETO ET AL., PLAINTIFFS IN ERROR, VS. JOHN DUNCAN, DEFENDANT IN ERROR.

Abstract of Record.

This was a suit in Chancery, brought to foreclose a mortgage, executed in favor of John Duncan, defendant in error, by William Whaley, in his life time, and Sarah Ann Whaley, his wife, now Sarah Ann Prieto, one of the plaintiffs in error.

Pages 1, 2, 3, 4, 5, 6, 7, 8 & 9.	1st. Bill of Foreclosure.
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Pages 20, 21, 22 & 23.	8th. Master's report of sale.
Page 23.	9th. Master's report approved.
Page 24.	10th. Assignment of errors.

Errors Assigned.

The Court below erred in defaulting defendant, Sarah Ann Prieto, the return of the officer showing no legal service of summons upon her.

D. L. HOUGH, Att'y for Pl'ffs in Error.

Additional Assignment of Errors

1st The Court erred in rendering the decree against Sarah A Prieto. (late Sarah A Whaley) the bill containing no averment that she ever executed and acknowledged the mortgage.

2nd The Court erred in rendering said decree. because neither Administrator or Executor of William Whaley

(over)

deceased, is made party defendant to the bill of complaint,

3^d The Court ordered in decreeing that the balance of mortgage debt not satisfied by sale of mortgaged premises, be paid from Estate of Wm. Whaley, in due course of Administration or Executor is party defendant.

4th The Court ordered in rendering the decree aforesaid, in manner aforesaid.

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Prieto vs Duncan

Abstract

Filed April 13, 1859

L. Deland

Clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

SARAH ANN PRIETO, et al., }
 vs. }
JOHN DUNCAN.

PLAINTIFF'S POINTS AND AUTHORITIES.

1st Point. The Court below erred in defaulting defendant, Sarah Ann Prieto, the return of the officer showing no legal service of summons upon her.

2d Point. There is no averment in the bill that Sarah Ann Prieto (late Whaley) ever executed said mortgage in such way as to divest her dower.

3d Point. The decree that the balance of the mortgage debt not satisfied by the sale of the mortgaged premises should be paid from the estate of William Whaley, in due course of administration, was unauthorized, neither administrator or executor being a party to the suit.

D. L. HOUGH,
Attorney for Plaintiff in error.

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Sarah A. Smith & Co

W
John Duncan

— " —
Oliver. Bros

Filed April 26, 1859
L. Leland
Clerk