

No. 14552 $\frac{1}{2}$

Supreme Court of Illinois

Wardwell

vs.

McDowell

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 28

Wardwell
vs
McDowell

Just. Leet Barant
Dunbar

14552 1863

1803

1803

1
State of Illinois }
La Salle County } Pleas before the Honorable Mad-
-son E. Hollister the Judge of
the Ninth Judicial District of the State of Il-
-linois, and the Presiding Judge of the La Salle
County Circuit Court at a term of said Court
commenced and held at the Court house in
Ottawa in said County on the first Monday in
the month of November, the same being the
Second day of November, in the year of Our
Lords one thousand eight hundred and fifty
Seven, and of the Independence of the
United States of America the Eighty Second.

Present the Honorable Madison E. Hollister

Presiding Judge

John F. Nash Clerk

Washington Bushnell States attorney

Eni L. Waterman Sheriff

Be it remembered that on the 4th day of Novem-
ber 1857, a declaration & notice in Ejectment
was filed in the ^{said} ~~office of the Clerk of the Cir-~~
cuit Court - and afterwards on the 1st day of
December 1857 said declaration was filed as
amended and is in the words & figures follow-
ing to wit;

State of Illinois } In the Circuit Court for the
La Salle County } November Term A. D. 1857.

Jane McDowell, John Dolin
and Barbara Dolin his wife on behalf
of said wife; Joseph Jones, and Martha
Jones, his wife, in right of said wife

Andrew Clinfelt, Jane Lapsley, Margaret Lapsley, and Mary Ann Lapsley, which last is a minor & sued also by her next friend and guardian, Thomas Dorrington, Plaintiffs, by E. S. Holbrook their attorney Complain of Orrin Wardwell, defendant,

1st Count.

For that whereas the said Plaintiff on the first day of March, in the year of our Lord, One Thousand, Eight Hundred and Fifty Seven, were possessed of a certain tract of land, with the appurtenances, Situate in said County and being known and designated as forty one Hundred and Eighth parts undivided of that part of the North West of Section fourteen, Township Thirty Three, North of Range one East of the Third Principal Meridian, bounded as follows, Commencing on the West line of said quarter Section, Ten Hundred and fifty One $\frac{3}{4}$ feet, North of the South West Corner, of said quarter Section, thence North, Three Hundred and Thirty feet thence East, Seven Hundred and Sixty feet, thence South Four Hundred and fifty Three $\frac{3}{4}$ feet, thence west four hundred feet, thence North one Hundred & twenty Three $\frac{3}{4}$ feet, thence West Three Hundred and Sixty feet, to place of beginning, containing about Seven Acres, more or less, which said premises said plaintiffs claim in fee, and

(The names of Joseph Jones, and Martha Jones substituted, for Martha Cary by leave of Court on suggestion of her marriage)

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being, so possessed thereof, afterwards
to suit; on the first day of April
in the year of Our Lord One Thousand
Eight Hundred and fifty Seven, the
Said defendant, entered into the Said
premises, and ejected the Said plaintiffs
therefrom, and unjustly withholds from
the Said plaintiffs, the possession thereof
to the damage of Said Plaintiffs
of One Hundred dollars, and therefore
they Sue,

2 Count,

Jane McDowell, in last Count (named)
for that whereas also the Said plaintiff
on the first day of March, in the year
of Our Lord, One Thousand Eight Hun-
dred and fifty Seven, was possessed of
a certain tract of Land, with the ap-
purtenances Situate, in Said County and
being known and designated as the
undivided Twelve One Hundred & eighth
parts of Said tract of Land, set out and
bounded, in the Said first Count
above, which Said premises Said
Plaintiff claims in fee, and being
so possessed thereof, afterwards to
suit, on the first day of April
in the year of Our Lord, One Thousand
Eight Hundred and fifty Seven, the
Said defendant, entered into the Said
premises, and ejected the Said plain-
tiff, therefrom and unjustly withholds
from the Said Plaintiff, the possession
thereof to the damage of Said Plaintiff
of One Hundred Dollars, and therefore she Sues,

C. S. Holbrook, atty for Plffs
Thomas Dornington, guardian and
next friend of Said Mary Ann Sapsley

To the above named defendant,

You are hereby notified that the declaration with a copy whereof, you are now ~~now~~ = with served, and to which Copy, this notice is subjoined, will be filed on the 1st day of the next term of the Circuit Court of Lafalle County, that upon filing the same, a rule will be entered requiring you to appear and plead, to the said declaration within twenty days after the entering of such rule, and that if you neglect so to appear and plead a judgment by default will be entered against you, and the Plaintiffs will recover possession of the premises specified in the said declaration

Dated this 21st day of September
A.D. 1857. Yours &c

C. S. Holbrook attorney for
Plaintiff, Thomas ~~Dornington~~ ^{Sapsley}
as Guardian and next friend of
Mary Ann Sapsley.

3^d
Count.

For that whereas also, the said Plaintiffs in ~~Count~~ the first Count named, To wit John Solin and Barbara Solin his wife in right of said wife, Martha Cary and

Andrew Clinfelter on the first day of March, in the year of Our Lord One Thousand, Eight Hundred and Fifty Seven, were possessed of a certain tract of land, with the appurtenances Situate in Said County and being known and designated, as the undivided Sixteen and Hundred & Eighth parts of the Said tract of land, set out and bounded in the Said first Count above, which Said premises Said plaintiffs claim in fee, and being, so possessed thereof afterwards to wit, on the first day of April, in the year of Our Lord One Thousand Eight Hundred and Fifty Seven, the Said defendant entered into the Said premises, and ejected the Said plaintiffs therefrom and unjustly withheld from the Said Plaintiffs the possession thereof, to the damage of Said Plaintiffs of one Hundred dollars, and therefore they sue,

4th Count,

For that whereas also the said plaintiffs - Jane Sapsley and Margaret Sapsley in first Count named, ~~for that whereas~~ also, the Said Plaintiffs, on the first day of March, in the year of our Lord One Thousand Eight Hundred and Fifty, possessed of a certain tract of land, with the appurtenances Situate in Said County and being known and designated as the three undivided one Hundred and Eighth parts of Said tract of land, set out

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And bounded in the Said first Count above,
which Said premises Said Plaintiffs claim in fee
and being so possessed thereof afterwards to suit
on the first day of April, in the year of our
Lord, One Thousand Eight Hundred and Ninety
-by Seven, the Said defendant entered into the
Said premises and ejected the Said Plaintiffs
therefrom and, unjustly withholds from the
Said Plaintiffs, the possession thereof, to the
damage of Said Plaintiffs of one Hundred
dollars, and therefore they Sue.

E. S. Holbrook, Atty for Plffs

To the above named defendant,

You are hereby no-
tified that the declaration, with a copy whereof
you are now herewith Served, and to which
Copy this notice is Subjoined, will be filed on
the 1st day of the next term of the Circuit
Court of Lafalle County; that upon filing
the Same a rule will be entered requiring
you to appear and plead to the Said
declaration within twenty days after
the entering of Such rule; and that if
you neglect so to appear and plead a
judgment by default will be entered
against you, and the plaintiffs will
recover possession of the premises speci-
fied in the Said declaration.

Dated this 21st day of September A.D.
1857.

E. S. Holbrook
Attorney for Plaintiffs.

6 State of Illinois } In the Circuit Court for the
LaSalle County } November Term AD 1857

5th
Count

Mary Ann Lapley a minor who sues also
by her next friend and Guardian Thomas
Dorrington plaintiff by E. S. Holbrook her
Attorney complains of said Orrin Wardwell
defendant. For that whereas the said plaintiff
on the first day of March in the Year of our
Lord one thousand eight hundred and
fifty seven was possessed of a certain tract
of land, with the appurtenances, situate
in said County and being known and
designated as five - one hundred and
Eighth parts undivided of said tract
of land set out and bounded in said
first Count above which said premises
said Plaintiff claims in fee and being
so possessed thereof, afterwards, to wit:
on the first day of April in the Year
of our Lord one thousand eight
hundred and fifty seven the said
defendant, entered ^{into} the said premises
and ejected the said plaintiff therefrom
and unjustly withholds from the said
plaintiff the possession thereof: to the damage
of said plaintiff, of one hundred dollars;
and therefore she sues

By Thomas Dorrington
Guardian & next friend of
Mary Ann Lapley, a minor

6th Count

For that whereas also the said plaintiffs
John Dolin & Barbara Dolin his wife in first
Count named on the first day of March

in the Year of our Lord one thousand
Eight hundred and fifty seven were
possessed of a certain tract of land, with
the appurtenances, situate in said County
and being known and designated as
the twelve undivided-one hundred &
Eighth parts of said tract of land set out
and bounded in the said Court above
which said premises said plaintiff Barbara
Solis claims in fee in her own right and
being so possessed thereof, afterwards, to wit,
on the first day of April in the Year of
our Lord one thousand eight hundred
and fifty seven the said Defendants
entered into the said premises, and ejected
the said plaintiffs therefrom and unjustly
withholds from the said plaintiffs the
possession thereof; to the damage of said
plaintiffs of one hundred dollars; and
therefore they sue

C. J. Holbrook. Atty for Plff

To the above named Defendants:-

You are hereby notified that the
declaration, with a copy whereof you are
now herewith served, and to which copy
this notice is subjoined, will be filed
on the 1st day of the next term of the
Circuit Court of LaSalle County; that
upon filing the same a rule will be
entered requiring you to appear and
plead to the said declaration within
twenty days after the entering of such
rule; And that if you neglect so to
appear and plead a judgment by default

8 will be entered against you, and the plaintiffs will recover possession of the premises specified in the said declaration.

Dated this 21st day of September A.D. 1857

Yours &c

E. J. Holbrook, Attorney for Plaintiff
Thomas Dorrington Guardian next
friend of Mary Ann Lapley, a minor

7th Count State of Illinois In the Circuit Court
LaSalle County 3rd Nov Term. A.D. 1857

Frederick Clingfeller and
Joseph Jones and Martha Jones his wife
in right of said wife, by leave of Court
obtained, the marriage of said Martha
to said Joseph having been suggested
or heard plaintiffs by E. J. Holbrook
their Attorney complain of Orrin Wardwell
defendant: For that whereas the said
plaintiffs on the first day of March
in the Year of our Lord one thousand
Eight hundred and fifty seven were
possessed of a certain tract of land with
the appurtenances, situate in said County
and being known and designated as
four undivided one hundred and
Eighth parts of said tract of land set
out and bounded in the above first
count which said premises said plaintiffs
claim in fee and being so possessed
thereof, afterwards, to wit, on the first
day of April in the Year of our Lord one
thousand Eight hundred and fifty seven
the said defendant entered into the said
premises and ejected the said plaintiffs

therefrom and unjustly withholds from
the said plaintiffs the possession thereof; to
the damage of said plaintiffs of one hundred
dollars; and therefore they sue

8th Count For that whereas the said plaintiff Fincham
bluefetter on the first day of March in
the year of our Lord one thousand eight
hundred and fifty seven was possessed
of a certain tract of land, with the appur-
tenances, situated in said County and being
known and designated as two undivided
one hundred & Eighth parts of the tract
of land set out in the first Count
above, which said premises said
plaintiff claims in fee and being so
possessed thereof, afterwards, to wit, on the
first day of April in the year of our
Lord one thousand eight hundred
and fifty seven the said defendant
entered into the said premises, and
ejected the said plaintiff therefrom
and unjustly withholds from the said
plaintiff the possession thereof; to the damage
of said plaintiff of one hundred dollars;
and therefore he sues.

O. S. Kolbrook. atty for Plff

To the above named defendant,

You are hereby notified that the declara-
-tion, with a copy whereof you are now
herewith served, and to which copy this
notice is subjoined, will be filed on the
- day of the next term of the Circuit Court
of said County; that upon filing the same

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a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entering of such rule; and that if you neglect so to appear and plead a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated this — of — AD 185—

Yours &c

E. S. Kolbrook

Attorney for Plaintiff

State of Illinois, LaSalle County, ss.

E. S. Kolbrook being duly sworn says that on the 23^d day of September AD 1857 he served upon Mrs Mary Wardwell a white person over the age of ten years a member of the family of Orrin Wardwell defendant in above declaration, at his house, which is upon the premises described in the above declaration, said Orrin ~~Wardwell~~ being then absent, with a copy of the above declaration notices.

Subscribed & sworn to before

Me this 4th day of November

AD 1857

J. F. Stark Clerk

E. S. Kolbrook

I do hereby enter myself security for costs in the above entitled cause and acknowledge myself bound to pay or cause to be paid to the opposite party and the officers of this Court all costs that may accrue to

11 them in the progress of this suit ac-
-cording to the laws of this State.

Sept 23^d 1857

E S Holbrook

On the 19th day of November A.D. 1857. the same being one of the days of the November Term of said Court for said year the defendant by his attorney filed in said cause a plea in the words & figures following, to wit;

"In Salem County Circuit Court - November Term 1857.

Orrin Wardwell

ats

} Ejectment

Jane M^c Dowell, John Dolin
and Barbara Dolin his wife, Martha Carey,
Frederic Clinefelter, Jane Lapsley, Margaret
Lapsley, Mary Ann Lapsley a minor who sues
by Thomas Dornington her next friend & Guardian.

And now comes the said defendant by W.
H. S. Wallace his attorney and defends the wrong
and injury where and says that he is not
guilty of the said supposed trespasses and
Ejectment in manner and form as the said
Plaintiffs have thereof in their said declaration
alleged and of this the said defendant puts
himself upon the Country &c

W. H. S. Wallace
atty for deft. "

On Saturday November 21st 1857 the same being one of the days of the November Term of said Court for said year an order was entered of record in said cause in the words & figures following, to wit

" Jane M^cDowell, John Dolin, & Barbara Dolin
his wife, Martha Carey, Fendren Clinefelter, Jane
Lafosley, Margaret Lapsley and Mary Ann Lapsley
a minor who sues by Thomas Dorrington her
next friend & Guardian

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vs

Orrin Wardwell

Ejectment

The plaintiffs
came by E. S. Holbrook
their attorney who suggests the marriage of
Martha Carey with Joseph Jones, and on
motion of said Attorney it is ordered that he
have leave to make said Joseph Jones a
party plaintiff to this suit;

On Tuesday February 7th 1860, the same being
one of the days of the February Term of said Court
for said year 1860, an order was entered of
record in said cause in the words and figures
following to wit;

" Jane M^cDowell et alie

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vs

Orrin Wardwell

Ejectment

This day the
plaintiffs by E. S. Holbrook
their attorneys suggest the death of John Dolin "

On Wednesday, March 7th 1860 the same being one of
the days of the February Term of said Court for
the year 1860, an order was entered of record in
said Cause in the words and figures following,
to wit;

"Jane M^c Dowell, John Dolin, & Barbara Dolin his wife, ^{Martha Carey} ~~Andrew~~ Clinefelter, Jane Lapsley, Margaret Lapsley & Mary Ann Lapsley a minor who sues by Thomas Dorrington her next friend & Guardian

q Orrin Wardwell } In Ejectment

This day the Plaintiffs came by E. S. Holbrook their attorney and the defendant by Wallace Cook his attorney and by agreement of parties a jury is waived and this cause is submitted to the Court for trial //

The following is a copy of a paper among the files in said cause - marked "agreed Case" viz;

LaSalle County Circuit Court, February Term A.D. 1860.

Jane M^c Dowell, Barbara Dolin Joseph Jones and Martha Jones, his wife, ~~Fin-~~ ~~drew~~ Clinefelter, Jane Lapsley, Margaret Lapsley and Mary Ann Lapsley

vs Orrin Wardwell

} In Ejectment.

It is hereby agreed by and between the parties to this suit for the purposes of trial (first hereafter only)

1st That both parties claim title from Samuel Lapsley now deceased - that said Lapsley deceased died in LaSalle in LaSalle County Illinois on or about the 21st day of June AD 1839 seized in fee of the premises sued for in said cause -

15-2

It is admitted by Said defendant that Said Plaintiffs are heirs at law of said Samuel Lapsley deceased and as such had the said Lapsley died intestate would have been entitled to fifty one hundred and eighth parts of the premises described in the declaration by descent and said defendant also admits that he was in possession of the said premises claiming title thereto at the time of the service of this copy of this declaration and notice in said cause -

3 It is admitted by said Plaintiffs that said Samuel Lapsley prior to his death and while in a sound and disposing mind & memory executed, published and declared the will a copy of which is hereto attached marked "A" and made a part of this agreement as his last will and testament - that he never afterwards made any other will and never in any manner altered or changed said will.

4 That said will was duly proven & recorded according to law in the office of the probate justice of the Peace of La Salle County on the 28th day of June ~~1837~~ 1839.

5 That Burton Ayres and William Weddington two of the persons named as executors in said will never took out letters testamentary, and that letters testamentary were issued thereon to the said John Furghendie the other person named in said will as executor by said Probate Justice of the Peace as executor of said will, a copy of which letters are -

that said Fingher was qualified as such executor and that Ayres and Waddingham were both alive at the time of the issuing of said letters to said Fingher - and at the time of the conveyance by said Fingher hereinafter stated, and that the said Ayres and Waddingham were in no wise legally disqualified from acting as executors of said will.

6 That on or about the 2^d day of October 1841 and after said Fingher had been qualified and while he held the office of executor as aforesaid he executed acknowledged and delivered to John Swenson and Mary Swenson the deed, a copy of which is hereto attached marked "C" and made a part of this agreement - and that defendant is possessed by regular deed of whatever title said Swensons obtained by said deed,

7 It is stipulated further that as to the present trial the first count only of Plaintiff's declaration is to be considered a part of the records

E. S. Holbrook

Atty for Plffs

W. H. L. Wallace for deft.

On Friday March 9th 1860, the same being one of the days of the February Term of said Court for the year 1860, the further and final Order was entered of record in said Cause in the words of the following, to wit:

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" Jane M^c Dowell, Barbara Dobin, Martha Carey
Ferdun Clinfelter, Jane Lapsley, Margaret Lapsley,
& Mary Ann Lapsley a minor, who sues by Thomas
Dorington her next friend & Guardian

9 }
Orrin Wardwell } Ejectment

This day the plain-
-tiffs came by E. S. Holbrook their attorney and
the defendant, by W. H. L. Wallace his attorney, and
by agreement of parties a jury is waived and this
Cause is Submitted to the Court for trial; and
after hearing the testimony the Court find the issues
joined to be in favor of the plaintiffs; that the plain-
-tiffs are Seized in fee Simple of the title to the land
mentioned in their declaration, to wit: Forty-one
hundred and eighth parts undivided of that part
of the North West of Section fourteen Township
thirty three north of Range one East of the ^{third} prin-
-cipal Meridian bounded as follows, commencing
on the West line of said quarter Section ten
hundred and fifty one $\frac{3}{4}$ feet north of the South
West corner of said quarter Section thence north
three hundred and thirty feet, thence east Seven
hundred and sixty feet, thence South four hun-
-dred and fifty three $\frac{3}{4}$ feet thence West four
hundred feet thence north one hundred & twenty
three $\frac{3}{4}$ feet, thence West three hundred and sixty
feet to place of beginning, containing about seven
acres more or less, and being in the County
of La Salle and State of Illinois, and that
the defendant has been guilty of unlawfully
withholding the possession of said premises from
the plaintiffs.

It is therefore considered by the Court that

the Plaintiffs have and recover of & from the
defendant, the Possession of said above described
lands and Premises, that a writ of Possession
issue therefor, and that the Plaintiffs have and
recover of the defendant their costs and charges
by them herein expended and that they have execu-
tion therefor.

\$5.50 per second-hand

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

April Term, A. D. 1863.

WARDWELL,
vs.
McDOWELL, et. al. } ERROR TO LA SALLE.

POINTS AND AUTHORITIES FOR THE DEFENDANTS
By E. S. HOLBROOK.

The will is not sufficiently set forth in plaintiff's abstract, and I have not now access to the record, and cannot quote from it; but a full copy is given in 20 Illinois, 466.

This may well be called the same case that has been before this Court twice before, though the parties are different. On the first hearing in this Court I maintained that a sale by one executor was not within the power, the others declining to act; according to the general doctrine of powers, and the provisions of the Statute of Wills of 1837, Sec. 89, (which is the same as Sec. 93 of the present Statute.)

The Statute of 21, Henry VIII, was quoted against me. I replied that that was not the law in this State; that it applied only to sales where the duty of the donees was merely ministerial, and not discretionary; and that the refusal of the donee of the power should be by deed or its equivalent; not by words or acts, or matters in pais; but by something as solemn as the usual conveyances of land, &c.

2.

The Court held that the power, as the case was then presented, was a naked power; that the Statute of Henry VIII was in force; that it was a question of refusal under said Statute; that the evidence of the refusal of the other executors was not sufficient, and spoke approvingly of my position as to what would constitute a *refusal* under that Statute. The point that the Statute did not apply to discretionary sales was not touched in the opinion rendered.

Another trial in the Court below resulted in favor of the claimants in accordance with the plain teachings of that decision.

On appeal it was held (20 Ills , 465) that under the Statute of this State of March 4th, 1837, it might be proved by other than record evidence that one, appointed executor by will, refused to act as executor.

And now another trial has been had in the court below resulting in favor of the plaintiffs, notwithstanding this last decision, upon principles that I will now maintain as correct law.

All the evidence offered by either party was heard by the Court, and as the Court found against the evidence offered by defendant, the question is if the Court found against relevant and competent testimony; and against such testimony sufficient to sustain a different finding?

I now maintain these several points upon the case made by the record:

I

The power conferred by the will is a naked power. It does not appear by the will that it should be exercised for any purpose. It is not proper to consult anything but the will to discover the *nature* of the authority given by it. There is no *latent* ambiguity. The will must be its own interpreter; and it would violate the most common and approved rules of law to make reference to the opinion or declarations of the testator or his neighbors at the time, or of his executors or others afterwards, to demonstrate the legal meaning of the will.

It is admitted in the first decision, 16 Ills, 332, that the power without reference to any matter *dehors* the will is a naked power; and it is held, in view of many authorities cited, to which many more might be added, *passim*, that as such, at common law, all parties, or at least a plural number of the donees, are required to join in its exercise.

3.

Now then the will on its face failing to show any other than a naked power, that power cannot be changed, diminished or enlarged, by extraneous evidence.

2 Phil. Ev., (Cow., Hill & Edward's notes (752, note and authorities cited. Mann vs. Ex. of Mann, 1 John Ch. R 234, and cases cited.

II.

If this State adopted the English Statute 21. Hen. VIII, then the law is, that it adopted the construction put upon it by the English courts; and by this rule of construction little or no regard can be had to the decisions of our sister States, if variant from those of England.

Adams vs. Field Ex. 21 Ver. Rep. 256.
Armstrong vs. Armstrong's heirs 29 Al. Rep. 538.

III.

And if this be a question of *refusal* under the Eng. Statute, as this Court in 16 Ills., 337 says it is, the English decisions will show that the evidence of the refusal of Ayres and Waddingham to undertake the trust is not sufficient; (see cases cited,) that "the *refusal* cannot be by word only, it must be entered and recorded in court," and the conclusion, "that it cannot be by mere words, or other matters *in pais*, is well supported by authorities."

If the entry in the Probate Court be held to be a record, it cannot, according to legal rules, be varied, extenuated or enhanced, by parol testimony; and it has been held that it does not show a refusal. If it be not a record, then there is *no record* evidence of a *refusal*. I hold that it was *not* a record of anything, as the court was not a court of record; and further as the judge of Probate, in this matter, was acting ministerially, simply, he did not, and could not, make a *judicial* entry. I hold also that the conversation had at the time of proving the will cannot be connected with the entry made near three months afterward, and at another term of the court; and so their statements amount to no more than their statement to any other person, at any other time or place.

Such entry, too, is not legal evidence of anything. It does not appear by the order that the Court had any jurisdiction of the persons; and being a court of limited jurisdiction, particularly as there is no rehearsal or assumption of jurisdiction, none can be presumed. A record must be perfect and prove itself.

3 Hagg, Eccl. Rep. (5 Eng. Eccl. Rep. 226.)
 1 William's Ex. 231, 234, 235.
 3 Bac. Ab. Ex. 44.
 Tollers Ex. 42.
 Wentworth Ex. 88.
 Broker vs. Chanter Cro., Eliz. 92.
 Harrison vs. Harrison, 2 Rob. R. 406.
 McIntosh vs. Barber 8 C. Law R. 396.
 Stebbins vs. Lathrop 4 Pick. 43.
 Roseboom vs. Moshier 2 Denio 70.
 Bennett vs. Silliman, 3 Kernan, 93.
 Taylor vs. Morris 1 Conn. 349, 350.
 Dayton on Serrogates 201.
 Hustin *et. al.*, vs. Mateor 16 Ser. & B. 418.
 Heron vs. Hoffner *et. al.*, 3 Rawle 393. 397.
 28 Penn. St. Rep. 465

IV.

If it be regarded as a question of power under the 21, Hen. VIII., I maintain that that Statute applies only to cases where there are certain and specific acts to be performed by the executor; at least where the duties are, substantially, merely of a ministerial character; and does not apply to cases where the discretion of more than one person is contemplated by the testator, either as to the doing the act or as to the manner of doing it.

Ordinarily in matters of public or private concern, where the joint action or discretion, of a number of persons is provided for, at least a majority must meet and act together, in order to constitute a legal, valid action; and I don't see why this rule should not apply to a number of persons on whom a power of sale is conferred by a will that provides for their common or united discretion. It would seem not to be within the power of legislatures, or Courts, to thwart such a provision. It is a contract or in the nature of a contract, which should not be abrogated.

Sinclair vs. Jackson 8 Cow. R. 582.
 Powell vs. Tuttle 3 Coms. 339.
 Pearson vs. Jamieson 1 McLean 197.
 Perry vs. Lyman, 22 Barb. S. C. R. 22.
 85 Com. Law Rep. 403.
 4 John Ch. R. 768.
 Williams vs Murray's Ad. 3 Ver. 197.

Clay vs. Craig, *et. al.* 7 Dana 9.
 3 J. J. Marshall, 248.
 Bartlett vs. Smith 24 Miss 395.
 Shelton vs. Homer 5 Met. 362.
 2 John Ch. Rep. 22.
 Hill on Trustees, 472, 478, 501.
 Wooldridge's Heirs vs. Watkins' Ex. 3 Bibb 350.
 Jamieson vs. Smith, Ex. 4 Bibb. 307.
 Green vs. Miller, 6 John R. 41.
 Bull vs. Bull, 3 Day, 284.
 Floyd's heirs vs. Johnson, 2 Littell 115.
 Schoenbergers Ex. vs. Lancaster Savings Institution, 28 Pa. St. Rep. 465.
 Beverly vs. Peters, 10 Pet. Rep. 534.
 Sharpstein vs. Tillon, 3 Cow 654.
 Townsend vs. Wilson 1 Barn. & Al. 612.
 Cole vs. Wade, 16 Ves. 19.
 Lord vs. Lord, 85 C. Law R. 403.
 Toler vs. Toler, 2 Pat. & Heath, 71.
 Evans vs. Landon 1 Gil. 308.
 Smith *et. al.* vs. Hileman 323.
 1 Bl. Com. 501.
 4 Kent, 327, 333, 504.

V.

A power by will to convey lands is a power of attorney. The will and the deed under the power constitute one conveyance. Executors, as such, have no power over the real estate of decedents. If power over real estate is given by the will to the executors, they hold two distinct offices, the duties and lines of which are clearly distinguishable; where the one ends, the other begins. If not trustees of the estate they are still trustees of the power. The power is an existing thing held jointly, as is the estate of trustees in a purely trust estate; and it matters not as to their duties, and how they shall act, how they are named, whether as "my executors," "my said executors," or "executors hereafter named;" such phrases being merely *pro nominal*, to avoid the repetition of their names.

This power being created *by the will* does not need nor rely on the probate to give it validity. The probate court has no common law power over the realty. It can confer nothing on those having power of sale by the will, and it can take nothing away.

It follows then that the granting of letters to one of these three persons appointed executors did not affect the rights and powers of that one, nor of the others over the realty. All the refusal that can be claimed to be shown by the evidence, such as it is, is a refusal to take letters testamentary.

Hall vs. Irwin, 2 Gil 176.
 Conkling vs. Edgerton's Ad., 21 Wen. 438.
 Clark vs. Tainter, 7 Cush. 567.
 Tainter vs. Clark, 13 Met. 221.
 Battelle vs. Parks, 2 Mich. 531.

6.

Newton vs. Bronson, Ex. 3 Ker. 93, 587.
Dominick vs. Michael, 4 Sandf. 401.
3 Lom. Dig. 395.
Going vs. Emery, 16 Pick. 93.
Adams vs. DeCook, 1 Cal. C. C. Rep. 253.
Scott vs. Bryant, 36 C. Law. 438.
Doolittle vs. Lewis, 7 John. Ch. 45, 48.
Conrads Appeal, 3 Pa. St. R. 47.
Lewin on Trustees, 297.
Toller on Ex. 242.
2 Sug. on Powers, 534.
Hill on Trustees, 472, 478, 501.
Vance on Powers, Nos. 613, 614, 628.
Judson vs. Gibbon, 5 Wend. 224.
Wells vs. Cowen, 1 Ohio 278.
Dayton on Sur. 582.
Bloodgood vs. Bruen, 2 Brad. R. 8.
11 East. 288, (6 New Ed. 144.)

VI.

But it is said, by way of objection, that the power belonged to the office, and that whoever held the office held the power. This true there is language to this effect in the books on the question of survivorship, but there is a vagueness and uncertainty about it, and I cannot conceive it applicable to this case; a power connected with the office would be one conferred on him who should act—who should take letters, &c. But this appointment is by the will itself. The will gives certain powers and then names three persons to execute those powers. It is a less direct, but equally certain way of granting such powers to such persons. That number has not been lawfully reached by their own action nor by the probate court. Executors in the conveyance of real estate act as attorneys; and this proceeding is none else than this, "I give to my attorneys power to sell my estate, when, by what conveyance, and for what price, they, in their discretion, shall decide best; and I appoint my friends, A. B. & C. my attorneys." Who can doubt that this is a personal appointment; that I contract for their united judgment and action; and how can it be, because I call them by the title of executors, instead of attorneys, that the probate court, or their own action, can bind me by the action of one of them alone: still further, whether under the designation of attorneys, trustees, or executors, how can I rightfully be debarred of the joint discretion and action of the number of my appointment?

VII.

It becomes then my province to suggest, with due difference to the court, and to insist that the decision in 20 Ills. 465, was an unfortunate one: not that the principle there

maintained—that refusal to take letters might not be otherwise proved than by record evidence may not be correct; but that such principle was not one of importance in the case. These other leading principles which I have set forth seem not to have been observed, and no position or influence were given them. If it be a question of refusal under the Statute of March 4th, 1837, I insist on the benefit of another part of the same Statute, the 89th Section, which provides that sales made by the persons *appointed*, &c., shall be good. The converse of this is, that such pretended sales, unless made by the persons appointed by the will, shall not be good. *Expressio unius, exclusio alterius.*

VIII.

The case of Pahlman, Ex. &c. vs. Smith, 23 Ills. 448, is not fully and directly at variance with my positions. Some of the principles I have here advocated, and as one may say the philosophy of the doctrine of powers of conveyance under a will, appear not to have received that consideration they would seem to merit; perhaps they were not applicable, or perhaps they were not urged—but there is no absolute antagonism.

The two principles, the ministerial powers and duties of executors *ex nomine*, and the discretionary powers of executors and trustees, created by multiform expressions, run through the books almost parallel, at times so close that they seem to impinge, and the slight distinctions seem without a difference—but this case, coming fully up to the line on one side, does not embrace the case at bar. The language of the decision, p. 452, maintains the distinction, as it is also quite apparent in terms. There was in that case a written renunciation, a reason for the sale, (a trust to pay debts,) and a power to one in a certain event, showing a satisfaction with the office of one alone. But in the case at bar, none of these exist. There is nothing of a distributive or several character; nothing that looks to the action of one, but only a joint discretion and action of all the appointees.

IX.

I do not insist that, by a failure of the appointees to act, *therefore* the powers must fail. The court of chancery takes the place of trustees who refuse or neglect to act.

This *seems* to be a meritorious case. Some of those infants who were designed to be the recipients of the testators bounty are among the claimants, and it is highly probable that the counter claimants were well cognizant of the defects of their title, and paid the more moderate price on that account.

8.

To say that the principles I have urged shall not obtain in the case at bar, is to ignore very prominent opinions and discussions found in all our reports; and to hold that they are vain, perhaps hypercritical and useless—lights that lead astray. I have considered there was a truth pervading them however apparently conflicting, and that I believe is laid down in my propositions here. In case of doubt that course is to be chosen which is most consistent with general and well received principles, and will be for the greater good.—The first decision was well as far as it went. It should be followed for one reason, because it has been made, and has been a law in the acquisition of property many years. But a greater reason is this—land titles should be evidenced as far as possible by written documents. The laws and the permanent good of the people require it.

The judgment of the court below should be affirmed.

Bandwell

McDowell

Dr. J. H. H. H. H.

Dr. J. H. H. H.

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Case No. 28 in Supreme Court, 3^d
Grand Division, April Term, 1863.
Wardwell vs. M'Dowell et al.
Error to LaSalle.

Argument for Defendants in Error
by C. S. Holbrook.

May it please the Court:

This case has dragged
its slow length along, and is now
here for the third time. I had sup-
posed that substantially the matter
was fully decided and finally settled
in the first decision, although in somewhat
of a negative form.

By the second decision I must be
permitted to say that I was surprised,
as I believe also were the opposing
counsel, as the case went off on a point
not made by either party.

Another decision has been had in
the Court below in favor of the plain-
tiff, notwithstanding the second decision,
upon general principles of law, found
at large in the text books, sustained by
other Courts, and heretofore in this
Court, which as I maintained there
I will maintain here, as paramount

to anything found in said second decision.

1st Point.

I hold that the power conferred is a naked power. It is so on the face of the will, affected as it is by the presumption of law and the rules of construction. His Honor, Judge Bates, in the first opinion, so holds. He says "I presume the personality was not only sufficient to pay debts and funeral expenses but also to pay the legacies."

The law sustains this position. In *Sims vs Sims* 2 Stockton's Ch. Reports p. 158, it is said "The personal estate is the only fund for the payment of legacies, unless a contrary intention appears in the will."

Now then it is not intimated in the will for what reason, or on what account, authority was given to convert the real estate into money. It is true one may reason and infer that it was intended to pay legacies in particular, perhaps also debts: but this is not legal logic: particularly when the legal presumption is that there was personal property enough to pay debts and legacies.

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or that the testator appropriated or intended to appropriate only his personal property for that purpose. The power - in the will although there might be reasons for its exercise if the personal property were not sufficient to pay debts and legacies (a fact to be found afterwards) stands, in fact, by itself naked alone.

Now I maintain that this power, prima facie a naked one, cannot be transmuted into a power coupled with an interest or trust, by proof of extraneous matter.

I am aware that Mr Justice Stirling in the first opinion, gave a slight hint of such a proceeding: but I (modestly as I may) submit this proposition of law and point to my authorities.

The authority in Phil. Co. 752, speaking of evidence aliunde &c says that "it is inadmissible for the purpose of ascertaining whether the real estate was charged with the payments of debts in part only or in exoneration of the personal estate" or "of rebutting a presumption which arises from the construction of words simply, qua words."

= or "of raising a presumption = of increasing
a legacy = of ascertaining an intention,
which upon the face of the will was
indeterminate = of varying the legal
effect of a will - or generally of
proving intentions."

(See authorities here cited, and those
Cited on p. 755.)

The syllabus of the case in 1 John-
son, Rep. 234, is this:

"Parol evidence is
inadmissible to supply or contradict,
enlarge, or vary, the words of a will,
or to explain the intention of the
testator, except there is a latent am-
biguity arising dehors the will, as
to the persons or subject matter to be
described; or to rebut a resulting trust."

And the reason given for such
rule is that "then the witnesses and not
the testator would make the will." "How
can there be any certainty? a will
may be anything, everything, nothing."
"The only apology for parol proof
in any case is the necessity of the thing
because the ambiguity is so complete
as to elude all interpretation and
would destroy the devise altogether
unless explained." "How appropriate

this language to the matter in hand. There is proof that the testator sometimes considered himself the owner of considerable personal property, that he spoke of funds at a distance of which there is no other testimony. His neighbors differ, some regard him as "a monstrous great talker." Money was easy and property bore a high price in 1839; a commercial storm sweeps over the country, and the executor in 1841 reports only \$2000 out of the \$10000 the testator thought he had. Perhaps really it was in existence, but the executor did not find it.

So here you have "anything, everything, nothing." The witnesses make the will. At one time, a power coupled with a trust is made out to the satisfaction of a jury or a Court; at another, not.

Such cannot be the law; and the principles laid down in *Phil. on E.*, I doubt, ^{not} ~~cannot~~ be found in almost any book, or case, on the subject. Being a naked power, the construction given in the first decision and the authorities cited must apply. The Court below was justified in not regarding the testi-

money given as to the condition of the estate.

But I do not insist that there is anything in this that is absolutely decisive of the case. If held against me, I think none the less of my other points; and it may be that though the Court agrees with me in this there may still be other points of importance to discuss.

2nd Point.

On the 2nd point, as to the adoption of the Eng. decisions on the Statute with the adoption of the Eng. Statute, I suppose, as the rule is so well established, there will be no controversy. The syllabus in 21 14. 256, is this.

"When an English statute which has received a fixed and known construction is adopted in this state it must receive the same construction here, and on this ground that such was the implied intent of the legislature. The case in 20 14. 338 was, precisely the same language, and the question in such

11

case was as to what constituted a sufficient signing of a will within the several statutes of wills of those states, which were substantially transcripts of the Eng. Statute.

But the case at bar is somewhat different from these. The Statute which is claimed to control this matter is an Eng. Statute, adopted by our state, and with it the common law of England, which embraces ^{and} ~~include~~ the decisions of Eng. Courts on this statute, and the texts of well-accredited law-writers.

This was done at an early day and it was renewed in 1845 - and I insist that the Eng. decisions are paramount law, and the decisions of our Sister States that are variant from these are no law unto us, and may only be consulted as advisory aids when they are not variant from them.

3^d Point.

I am now to consider the matter as a question of refusal, on the part of C. F. Jones and Huddingham under the Eng. Statute, 21 Hen. 8th Ch. IV, according to the Eng. Statute deciding with their preeminent force, aided as they may be by American decisions.

And why should I go over this ground again? In the first decision my position was recognised as correct. In the second decision, this position, as a position under the Eng. Law was not attempted to be overthrown but simply the position taken there under our Statute of March 4th 1837, as a justification of the issue of letters testamentary to one, it might be proved by parol that the others refused to take out letters.

The authorities that I have are nearly all noticed by Mr. Justice Bates in the first opinion. The others that I have added show more fully the recognized law, and practice of requiring the disclaimer to be in writing and entered of record, when this Court has said

"that the refusal cannot be by mere words or other matters in pais is well supported by authorities," I must be justified in assuming that this is the end of Controversy on this point.

Let it be understood that I protest and aver that there are stronger points in the case in my favor than this - but as the Statute of Hen. 8th has been raised against me and a pretended refusal under it, I insist that there is no such refusal as is required by the Statute as interpreted by the decisions and practice of the Courts of Eng.

Why should a writing or a record be insisted on? Because it pertains to the transfer of Real Estate.

Now these points are in order and these objections substantiated. The ecclesiastical Court of Eng. was a Court of record. An entry in their reports came down to us. It is a Court of dignity. The Probate Court of March 11th 1851 was not a Court of record. An entry in the ecclesiastical Court was a judicial entry, not so in this Court, most certainly not, as to receiving letters, as has been

many times determined. The determination of the Probate Court, that some declined acting was no judicial finding. But if it be the record of a Court, why do not the rules of law applicable to a record apply to it? A record must prove itself. It must show jurisdiction of the person. You can't make, or alter or enhance a record by parol.

This record standing alone, cannot be used as a record, because it shows no jurisdiction of the person, or if used, as has been correctly held, does not show a refusal.

Would you prove by parol that one was summoned, or that one appeared in Court, and confessed a judgment, or disclaimed in judgment, or the like of these.

Then so far as regards record evidence you cannot prove by parol that Ayres and Baddingham were at some time before the judge of Probate (at another time than when the entry was made) and made some statement, If parol statements are to be taken then that testimony is to be taken so far as parol testimony,

but it is none the more weighty on account of the place and time when made.

But should not the Eng. rule be followed? Is it not expedient, as well as according to the decisions, that when Real Estate title is to be made that all the steps should be evidenced according to general principles pertaining to conveyances. That the evidence should be in writing?

I commend the reasoning of Mr Justice Scates in the first decision; and the reasoning in 3 Rawle 399 which holds that a writing is necessary and that it is highly advantageous in making titles certain and preventing litigation. If parol testimony be admitted here, behold on what loose, incoherent, uncertain and evanescent testimony the title to a large estate hangs. Since this suit was commenced two of the executors have died. The other is defendant in one case, and was the principal witness in this. The same reason that ever required conveyances, deeds and wills to be in writing, and that required the passage of

the Statute of Frauds, requires that all the proceedings through which you would trace title to this Estate should be in writing. The Claimants to this Estate feel that as the Statute of Henry 8th has been unexpectedly forced upon them and apparently against their rights, that they ought to receive whatever that will leave them as it has been interpreted heretofore interpreted.

It will be observed that my position in this respect is not controverted; as indeed I apprehend it cannot well be, by authorities or legal principles.

4th Point.

The Statute Henry 8th does not apply except to peremptory sales and where the duty is merely, or substantially, ministerial. The proceedings authorized in the case at bar are decidedly of a discretionary character, and therefore not within the law. Executors are appointed by the will. The testator who thought himself the owner of very valuable real estate, in giving extraordinary powers of sale, seems to have intended to have provided very proper and valuable safeguards in appointing three of his friends his executors and appointees of such powers as he himself proposed in his own person. As required every move to be made according to their united judgment and discretion. A sale is not absolutely ordered, or if it is, it is only when they should think best, which might never be. The disposition might be in any character, in fee simple, for a term of years, or otherwise; the price, the money, the credit, the security, — all were to be according to their judgment and discretion. And if the power is to be connected with other parts of the

will (which I insist may not properly be done), then it appears that the money was "to be kept ^{out} at interest at the discretion of said executors, the interest to be applied to the education and maintenance of children, then quite young, till they were of age or should marry.

The will points always to a joint action, and there is nothing of a several character in it.

Now I hold that, notwithstanding counter authorities can be found, the current and weight of decisions is in favor of my position, and also, that they are the most in accordance with reason and the general principles of law.

In all other matters the rule is without question or dissent that where an office or duty is thrown upon several persons, and there is no provision for several action, in private matters they must all act together, in public matters at least a majority must act together. If they act otherwise the act is void.

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In 8 Cow. R. 582. Sinclair vs. Jackson it
is thus held:

"It is a settled rule that where a trust or
authority is delegated for mere private pur-
poses the concurrence of all who are en-
trusted with the power is necessary to its
due execution" (quoting many authorities,
N 3 Coms. R. 399 Powell vs. Tittle.

Two public Comrs had power to loan
money; held that one could not act
alone.

Nor can a matter of personal con-
fidence be delegated.

1 N. H. 197 Parson vs. Jamieson. An
executor was empowered by will to
sell real estate "in the best mode in
his judgment" &c. The executor au-
thorized one attorney to sell &c. = held
not a binding contract. - citing author-
ities.

22 Barb. D. C. R. P. Perry vs. Lyman.
Where power of a private nature is
given all must meet to act.

A case in 15 C. Law Rep. 1103
holds that where two arbitrators
have power to appoint an umpire
they must meet and confer and ~~not~~
cannot act separately.

4 John. Ch. Rep. 76. Two Executors

one went abroad, and sent a power of attorney to the other to sell under the power - held not a good sale -

These are pertinent in this -

If one can perform the power given to three, it is a delegation of their power upon him.

This general principle of joint action with others than executors, doubtless will not be questioned.

And now as to Executors.

2d Vermont 10th. Williams vs. Murray's Ad.

This Case is much in point. Power of Sale, discretionary, was given to three executors, one died, one sold, and the other confirmed - held the sale not good.

1st Hanna G. Clay vs. Craig & Hart.

Case of discretion in executors under St. Henry 5th. One of several executors qualified and sold real Estate and did not properly account for the proceeds - action on his bond - held bondsman not liable as he had no power to sell - and so in Contention of law had not sold.

The other Cases quoted from Kentucky

maintain the same principle.

Case in 3 J. Marshall 248 holds a like sale where there was no discretion, good.

24 Mississippi 395, Bartlett vs. Smith - Case much in point, follows the New-England decisions - one of several executors qualified under Statutes of that State, which was stated to be a copy of 21 Min. 7th - and the Court says that the will (language about the same as here) points to a joint execution of the power, and holds sale by one not good.

In 5 Met. 466, the facts a little varied from case at bar but the reasoning is applicable. Authority is given to two executors to sell real estate - both executors qualified - one resigned and was discharged by the Court - and sale made by the other. The Court says "In relation to the authority itself conferred by the will we consider it a mere naked power not coupled with a trust. The mansion house estate is not specially devised and the authority given to executors to sell is discretionary, such a power as the Court could not compel them to exercise for any purpose required by the will

It is a power not assignably being specifically reposed in the executors by the testator, nor could it have been executed by a majority of the executors, if there had been more than two.

The Statute of Hen. 8th is acknowledged to be the law - but still by his resigning the executorship it is said the executor could not get rid of the power.

2nd John Ch. Rep. 22 shows in that case (which called for the discretion of the majority of those that should act) that there was no power in executor to sell except as survivor, and a sale by one sustained on the terms of the will were answered.

Hill on Trustees 501. In matters of personal confidence and discretion such must be obtained although the trust renounced (see also 472-8)

A word on the authorities quoted by plaintiff in error.

And here I say that although some counter authorities can be found there are none that go so far as to sustain this sale.

The discretion given to executors by will is of every shade and when then

has been no special Confidence in the personal judgment of his nominees, Courts have not always insisted on the joint action of all the appointees named. It is to be observed too, that when the Statutes of a State have introduced new rules Courts do not exhibit the same tenacity in following the old rules and authorities, and sometimes even seem to glide into new positions, as if they forgot or ignored the old.

This is peculiarly so in New York where their leading authority is gone. Since their Statute added need to qualify, there has been a manifest change in their decisions. The question of refusal being no longer a question of importance it ceases to be a nice question and consequently elicits no discriminations. A joint power being in most instances (where there is no reason against it) converted practically into a several one by the statute, the balance comes to be done by construction of Courts, when there is in fact a substantial reason against it.

The case in 1 Const. is undoubtedly

a divorce to the Kentucky decisions, and the others quoted by me; but still that will not sustain the plaintiff's Case. The will in that Case authorized "the executors or the survivor of them, to sell for the purpose of paying debts." The case is put on the State Statute which is not a Copy of 21 Hen. 8th, and which provides for neglect, and the testator showed no special demand for the judgment of all, as in one event, by provision of the will, one might act alone.

Case in 29 Pa. Dec follows this case; but it is put on this ground distinctly, because the testator had manifested no "special Confidence" in the others named "which is withheld from the survivor of those in whose discretion he was willing to confide."

The case quoted in 15 Grattan only shows that power survives under their Statute, if the will "does not point to a joint execution of it."

In 27 Conn. there was no special confidence in the judgment of the appointees, only this, the sale expressly ordered was to be made "as they think best"

also proof of refusal was made by record.

The case in 4 Sandf. is put upon the State Statute expressly, and is not a case of discretion; nor do I find that ~~that~~ in any other case that Mr. Cook has quoted is there any marked discretion given to the executors, nor in most of the cases is the point made,

None of these cases will fully sustain plaintiff's position in the case at bar. None equal this in the ^{amount} matter of discretion required of the executors, none that point so expressly to a joint execution of the power; none wherein the court record has been of so indifferent a character; none except the power was coupled with a trust by the express terms of the will; none wherein the like evidence of a refusal was relied on except in states which have statutes providing for mere neglect, the effect of which has been, as I have said, to cause a modification of decisions.

There is something of a conflict of authority. I do not know as the au-

authority of the decisions of one State are to be regarded as superior to that of another. The case in 1 Const. seems to conflict with other decisions in New York. It is often considered remarkable what conflicting decisions are to be found in New York reports.

This opinion is certainly against general principles, as I have shown before, and I do not see how it is, if I make a reference or call for the united action or joint judgment of several persons, that I should be deprived of it; and it makes no difference whether I call them my attorneys, my trustees, my friends, my executors or what not. I find no case in the Eng. books precisely like unto the one at bar. I apprehend the reason to be because the office of executors, as such, and ^{as} the appointees of powers of sale, are kept so universally distinct; but the principles of united action by referees, judges arbitrators, trustees, Commissioners and all those who have a joint authority, are prevalent and are evidenced by the Eng. authorities which I have quoted.

One reason why there are no more

Eng. authorities I apprehend is, that this method of conveyance was not in practice often appealed to. Indeed, according to their laws I do not see how it could be, nor do I perceive how the Statute of 21 Hen. 8th can give so much larger scope to the action of executors in modern times than it gave then. There is something quite peculiar and that is not often observed. Indeed it has been ^{almost entirely} lost sight of. Lands were not devisable at the time that that Statute was passed and fee simple estates were not subject to alienation until a point of time subsequent to that when we take up and adopt the Eng. laws and make them ~~ours~~ our own. In strict law then how can a power of alienation of lands in fee simple by devise or through a devise, be derived through those laws which gave none?

This law or history of law is set forth in 2 Blackstone pp. 375-6 and is referred to and recognized in 2 Gil. 181.

This consideration seems not to have been noticed in any of the American

decisions; and so I suppose it is unbecoming and immodest in me to insist on it now; on the supposition that in well-contested cases all the available points are made. But this supposition is not always according to the fact, and the last decision in this case stands on the supposition that the prevailing point was not made at the first hearing, nor then, by counsel.

The power of alienation of this kind of estate then rests in the common law doctrine of powers, (which I think was always appealed to in Eng.) or the 8th Sec. of our ~~own~~ said Statute of Wills which legalizes sales made in the manner and by the persons appointed in such wills; and by survivors and executors surviving executors, (and not otherwise).

5th Point.

The distinction between the office of an executor as such and the donee of a power is well set forth

by this Court in 2 Gil. 176. Hall v. Brown and in 21 Men. 1130 1131, which it quotes. The discussion in either case arises on a question different from the one at bar, but the positions taken and reasons given are applicable.

Now then I hold that Ayres, Haddingham and Saughered held, or were intended to hold, two offices, the one as executors proper in which they would control the personal estate under the direction of the Court of Probate, the other as donees or trustees of a power of sale of the real estate in which they were to act according to their authority, which was the will and the will alone, and not in any sense under the direction, or control of the Court of Probate: that therefore their neglect or refusal to qualify as executors by taking letters patent testamentary before the Probate Court, did not in any way affect them as donees of the power of sale. It will be remembered that the evidence is only by the entry by Probate judge, on issuing letters to one that the other persons named in said will as executors declined to act, or that they

verbally refused as proved by parol
to take out letters testamentary. Their
refusal to act as executors ^{as proved} by either
of these modes would preclude them
from acting as attorneys under the
will over the real estate.

The case in 7 Cush. 567 is this (in con-
nection with 13 Met. 229). The words of
Copeland's will were "I hereby nominate
and appoint Capt. Jonas Tucker
to be the sole executor of this my
last will and testament and hereby
authorize him and fully empower
him to sell and convey such of my
property as in his judgment will be"
&c. Tucker declined in writing in these
words "I, the subscriber, having been
named as executor in the last will and
testament of Ephraim Copeland do
hereby decline that trust." &c. &c.
&c. was appointed who sold. His
deed in 13 Met. held void and the
Court said, "Tucker, the donee of the
power has never renounced it, and the
consequent trust; and we are not aware
of any impediment to his executing it. He
has, it is true, declined the office of exe-
cutor, but the power of selling real estate
is no part of the business of an administrator

or executor ~~and~~ unless he obtains leave under the statute. The executor in this case was the donee of a ^{trust} power which was distinct from the office of executor and the trust might exist for years after the duties of the office of executor had fully been performed," and quotes from the Yearbook 15 Hen. 7 that "if a man has feoffees upon confidence and make a will that his executor shall alien his lands, then if the executor renounce administration of the goods yet they may alien the land for the will of land is not a testamentary matter" - and says further that this doctrine has been maintained ever since.

Two years afterwards Tucker resumed the trusteeship (as it is called here) and sold, according to the intimation of the Court, under this power and the sale was held good.

Now this is a much stronger case than the one at bar. Tucker was not made a trustee in the ~~terms~~ ^{will}. He refused in writing, referring to his appointment in the will calling it an executorship and was held still to hold his power of selling under the will. It will be observed that the Court did not put the

case on the ground that on the face of the will there were two offices apparent, that the donee of the power was an individual or trustee - but simply on the ground that the two offices were in their nature distinct, though constituted by the same language or phrase, and at once.

The case in 11 Sandf. 401, holds that the power one takes by the will is not affected by probate.

The case in 2 Mich. 531 holds that when an executor has power of sale under a will he may sell without probate.

The case in 3 Kernan 587 holds that executor with power of sale can convey land out of the state.

In 3 Lomax Dig. 395, 397 it is stated that executors with power of sale may execute it although they renounce probate of the will &c

In 16 Pickg. 93, the court refused to grant licence of sale to executor with power

of sale, on the ground that he had it already.

In 1 Cal. C. C. Rep. 253, sale by executor sustained without probate.

In 36 Conn. L. Rep. 438 it is held that executors derive title from the will though not proved.

In 7 John. Ch. Rep. 44, it is held that "when a person takes by the execution of a power he takes under the authority of the power equally as if the power and the instrument executing ~~the~~ the power were incorporated in the deed."

In 33 Pa. Rep. 47 it is held that "executors as such have nothing to do with legacies expressly charged on land."

The other authorities cited sustain the same position. The probate courts as a matter of practice in Eng. and America do not undertake to exercise any control over the power of sale, or those having the power. It is still a common law power, recognized only, as in our own State, and the law is, as expressed in our Statute

that conveyances made by the persons and in the manner appointed shall be good &c.

Now if this position be correct, and I think there is not an authority against it, how can it be that the neglect or refusal of Cypres & Waddingham to take out letters testamentary can affect their power over the real estate? The conclusion is inevitable that these two things have no connection with each other.

6th Point.

But an attempt is made to avoid this conclusion by saying that the power belongs to the office, and whoever holds the office of executor proper, by the determination of the probate judge has the power.

I do not doubt that power may be given to those who take out letters and to such only, if done in express terms, so naming it and restricting it. And it is to be remembered (and here arises the confusion because it is not so remembered) that executors receive their appointment from the

will, the same source whence they receive their authority over the real estate, if any. The testator makes A, B, & C, his executors and gives them power over his real estate. At the death of the testator, this power vests immediately and a sale can be made without probate. Now if they are said to sell by virtue of their office, it is their office as made by the testator, and not as such office may be modified by the probate Court, in matters pertaining to the personality, according to its Common law and Statute jurisdiction. And hence it is that our Statute Sec. 93, in accordance with the principles and authorities above cited confirms titles made by the persons appointed and in the manner authorized by the will without any regard to what a Court of probate might do.

A great deal of confusion has arisen in the decisions on account of not keeping in view the distinctive features of the two offices. The fact of using the same name to both spheres of action has contributed greatly to this, and we find far back occasionally a confounding of both offices, and hence an apparent conflict of statements and opinion, has

in some instances obtained.

7th Point.

This cannot be made any plainer than it is, on mere inspection, by the light of the principles exhibited in these authorities. If the case in 7 Cush. and the others that I have quoted be good law then the proof made in this case that Agnes and Waddingham refused or declined to take letters testamentary, whether under the Statute of March 4, 1837 or any other, does not dispose of the power of sale. Then that decision should not affect this case. I must insist as I honestly believe, that this should not be regarded as a question of refusal under our Statute, for as our said Statute did not affect to make any rule as to powers of sale in case of refusal, I don't see how it could come within the scope of that Statute at all.

I hope I shall not meet here with that sturdy fixedness in this Hon. Court that one may reasonably expect in a Court when it is appealed to by Counsel to overrule one of its own decisions. I do not controvert that the last decision

may have been correct as to the refusal of Ayres and Waddingham to take the office of executors proper considered in the relation to the personal property and which could be affected by the probate court.

But what I insist on is this (and I hope to do it with becoming modesty) that that decision was, as it were rather inadvertently made; that is to say, without due regard to these other paramount principles now maintained here, and which would then have been set forth more prominently had it been anticipated that the court would, in the least, have retreated from its first position, or would itself have suggested the new point, the pivot of the last decision.

8th Point.

I do not conceive that I can fortify or enhance what I have said in my brief on this point.

9th Point

Mr Cook on the hearing claimed that the case of Pahlman & Co was decisive of

the one at bar, I do not see that it has any bearing except upon the suggestion that the power attaches to the office of executor proper as modified by the probate court. As I understand it, if Pahlman and King ~~understood~~ took as trustees then both would have to convey, and the resignation of the one would not confer power on the other to act alone. If they took as executors, then under the statute of Hen. 8th and a proper renunciation of the one, the power of sale would be conferred upon the other. The chance for discussion arose by the almost contradictory phrases used by the testator in their appointment, and it was held that they took as executors.

In that case the power of sale was coupled both with an interest and a trust for creditors; it was given to them and the survivor of them, there was no discretion, and there was no question as to the renunciation of the one in due form of law. So in almost every respect the case was different from the one at bar. The opinion does not intimate that their duties, as executors proper and as trustees of the power, were confounded because the two offices were held

by the same persons, nor do I see an intimation that although they were to act in the sale of ~~said~~ ^{real} estate under the name of executors, if their joint discretion had been called for, although executors, it must not have been given. In fact such a proposition is almost negatived by the language of the opinion.

May it please the Court

This case is a matter of great importance to the plaintiffs below. They are poor and have had no other attorney than myself - and so I have labored as best I might to present all the points in the case somewhat at length and feel justified in so doing although I may have done it at the expense of Your patience. It is a long time since I commenced for them and now I hope for a final decision. I feel confident, notwithstanding the last decision and the case in 23 Ills. that the law is for them - that the power by the will is a naked power and cannot be made otherwise to appear by extraneous evidence, and hence must be strictly construed that if we have adopted the Statute of Hen. 8th, we have adopted the English interpretation of said Statute; that if it is a question of refusal of Ayres & Waddingham, it is such a question of refusal under such Statute - and they have not refused or renounced according to the provisions of that law, so interpreted - that this was the wish of the Testator which is the needle of interpretation - and that Ayres and Waddingham although

refusing to take letters testamentary are not proved to have renounced the power of sale in said will.

Unless all or at least some of these points are for the plaintiffs below, then it must be said that these principles of legal learning found in the text books and decisions of Courts, wrought out with so much careful discrimination and continuous labor and maintained from the first, shall all at once be ignored and held in no esteem whatever, and the learned discussions by the most eminent jurists sustaining these principles must consequently be pronounced only "lights that lead astray" "that lead to bewilder and dazzle to blind."

The plaintiffs below believe that all these points made are for them and they pray that the judgment of the Court below may be affirmed.

E. L. Holbrook

Atty for
Defts in Error

93 Case No 28

Wardwell

The Dowell et al

Argument for
Defendants

By
E. Hollbrook

Filed July 31st 1863

L. B. Mumell

(Bill of exception filed in Circuit Court
March 9. 1860.)

Jane M^cLowell et al

vs

Orvin Wardwell

} La Salle Co. Circuit Court
February Term A. D. 1860

Be it remembered that on the trial of this
cause plaintiff read in evidence an agreed
state of facts as follows:

La Salle County Circuit Court. February Term
A. D. 1860,

Jane M^cLowell, Barbara Dobin, Joseph Jones
and Martha Jones his wife. Heirs of Clinchell
Jane Lapsley, Margaret Lapsley and Mary
Ann Lapsley
vs
Orvin Wardwell } In Ejectment

It is hereby agreed by and
between the parties of this suit for the purpose
of trial (first hereafter only)

1st That both parties claim title from Samuel
Lapsley now deceased, that said Lapsley
deceased died in La Salle in La Salle County
Illinois on or about the 21st day of June A. D.
1839 seized in fee of the premises sued for in
said cause,

2nd It is admitted by said defendant that
said plaintiffs are heirs at law of said Samuel
Lapsley deceased and as such had the said
Lapsley died intestate would have been

entitled to forty one hundred and eighth parts of the premises described in the declaration by descent and said defendant also admits that he was in possession of the said premises claiming title thereto at the time of the service of the copy of this declaration and notice in said cause.

3^d It is admitted by said plaintiff that said Samuel Laprely prior to his death and while in a sound and disposing mind and memory executed, published and declared the will, a copy of which is hereto attached marked "A" and made a part of this agreement, as his last will and testament, that he never afterwards made any other will and never in any manner altered or changed said will.

4th That said will was duly proven & recorded according to law in the office of the Probate Justice of the Peace of La Salle County on the 28th day of June 1839.

5th That Burton Ayres and William Waddingham two of the persons named as executors in said will never took out letters testamentary and that letters testamentary were issued thereon to the said John Fargher the other person named in said will as executor by said Probate Justice of the

peace as executor of said will a copy of which letters are that said Faughander was qualified as such executor and that Ayres and Waddingham were both alive at the time of the issuing of said letters to said Faughander and at the time of the conveyance by said Faughander herein after stated. And that the said Ayres and Waddingham were in no wise legally disqualified from acting as executors of said will.

6th That on or about the 2nd day of October 1841 and after said Faughander had been qualified and while he held the office of executor as aforesaid he executed acknowledged and delivered to John Swanson and Mary Swanson the deed, a copy of which is hereto attached marked "C" and made a part of this agreement, and that defendant is possessed by regular deeds of whatever title said Swanson obtained by said deed

7th It is stipulated further that as to the present trial, the first count only of plaintiffs declaration is to be considered a part of the record

E. S. Holbrook

Atty for plaintiffs

W. H. L. Wallan for defts

To all whom these presents shall come or may concern Greeting,

Know all that we having inspected the records & proceedings remaining in the office of the Clerk of the County Court of our County of Lea Salle do find there certain records in the words & figures following to wit:

June 28th A. D. 1839

In the matter of proving the last will & testament of Samuel Laprely de^{ce}.

This day came Lorenzo Leclerc and Aaron Hunt two creditable witnesses to testify of and concerning the execution & validity of the last will & testament of Samuel Laprely deceased filed in this office. The said witnesses having been by one sworn testified of & concerning the execution & validity of said will and the same having been duly proven on this 2nd day of July 1839 is admitted to record, and is in the words & figures following to wit:

a"

Will

I Samuel Laprely of the County of Lea Salle & State of Illinois do make and publish this my last will & testament hereby revoking & making void all former wills by me at any time heretofore made. First - I direct that all my debts and funeral expenses be paid as soon after my decease

1 12 1 1
as possible out of the first moneys that shall
come into the hands of my executor. from any
portion of my estate real or personal.

Also - I give & bequeath to Benjamin Faugh-
amden, Julia Ann Faughamden and Emily Jane
Faughamden children of John Faughamden of
said County of La Salle the sum of One thousand
dollars each to be paid to them respectively at
their respective ages of twenty one years or days
of marriage, which shall first happen, the same
to be put out to interest at the direction of my
executor, and the interest accruing thereby to
be applied to their education & maintenance
respectively until their respective ages or marriages
, and if either of them shall die before the age of
twenty one years, or marriage, then I give the share
of the one dying unto the survivor of them.

Also, I give & bequeath unto Julius C. Cove the
sum of One thousand dollars as well for the
respect which I have towards him as for his
kindness & attention to me during sickness.

Also - I give & bequeath to Martha Cliniffellie
Margaret Cliniffellie. Frederick Cliniffellie.

Eliza J. Cliniffellie and Lucinda Cliniffellie
children of my sister Mary Cliniffellie the sum
of One thousand dollars each, to be paid to them
respectively at their respective ages of twenty one
years or days of marriage - which shall first

happen, the same to be put-out to interest at the direction of my executors, and the interest accruing thereby to be applied to their education and maintenance respectively until their respective ages or marriages, and if either of them shall die before the age of twenty one years or marriage, then I give the share of the one so dying unto the survivors of them -

Also, I direct my executors to sell & dispose of as soon as may be after my decease all my personal property for good current money, and that all the real estate of which I shall die seized or possessed shall be sold by my executors at any time when they may think proper, for its reasonable value for like current money or for such credit as they may think proper, and the amount thereof secured in such manner as is usual in like cases to insure the full & punctual payment thereof and to effectuate this my intention I do hereby vest in my executors full power & authority to dispose of my Real Estate in fee simple or for a term of years or otherwise in as full and large a manner in every respect as I could myself do if living - And I do hereby make & ordain my friends Burton Ayres, John Faughender & William Wadclingham executors of this my last will and

Testament,

I do witness whereof I Samuel Lapsley the testator have to this my will, written on one sheet of paper set my hand and seal this twenty sixth day of March in the year of our Lord Eighteen hundred and thirty one, Signed published & declared by the above named Samuel Lapsley as & for his last will & testament in presence of us, who at his request have signed as witnesses to the same (the words "Public Ann. Paupers" were interlined before signing Lorenzo Lelland of Ottawa Aaron Gurn

Samuel ^{his} Lapsley
mark

Proof

State of Illinois }
La Salle County }

On this 2nd day of July A.D. 1839 before me John V. A. Hoar Probate Justice of the Peace in & for said County appeared Lorenzo Lelland & Aaron Gurn, two credible witnesses, who being by me duly sworn depose & say, that they were present and saw Samuel Lapsley sign the within will in their presence, and that he the said Samuel Lapsley acknowledged the same to be his act and

deed that they believe the said testator Samuel Lapley to be of sound mind & memory at the time of the execution of the within will by him.

Lorenzo Leedom
Aaron Burr

Subscribed and
sworn to before me
this 2nd day of
July A. D. 1839

John V. A. Hoar, Probate Justice &c
September 6th 1839

John Langhamer executor
of the last will & testament
of Samuel Lapley dec^d } Application for
Letters

This day came the
said John Langhamer one of the executors
named in the will of the said Samuel Lap-
ley deceased therefore proven and admitted to
act, and made application for letters testa-
mentary. It appearing that the said Lapley
is dead, that the other persons named in said
will as executors decline acting, and that the
said applicant is entitled to letters as sole
executor of said will, and the said appli-
cant having filed in this office the requisite
Bond with satisfactory security. Letters

13

Testamentary are therefore given to the
said John Faughnman.

Letters

"B" State of Illinois }
Lea Ball County }

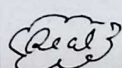
Yes
The People of the State of
Illinois to all whom these presents
shall come Greeting, Know ye, That whereas
Samuel Lapely late of the County of Lea Ball
and State of Illinois died on or about the
within the day of June A.D. 1839 at it is
said, after having duly made & published
his last will & testament a copy of which
is hereto ~~attached~~ annexed, leaving at the
time of his death property in this State which
may be lost, destroyed, or diminished in ⁱⁿ value
if speedy care be not taken of the same, and
inasmuch as it appears that John Faughnman
has been appointed executor in & by said last
will & testament to execute the same, and to the
end that the said property may be preserved
for those who shall appear to have a legal
right or interest therein - and that the said
will may be executed according to the request
of the said Testator, we do hereby authorize
him the said John Faughnman as such
executor to collect & secure all & singular the
goods & chattels, rights and credits which were
of the said Samuel Lapely deceased at.

the time of his decease in whatever hands or possession the same may be found in this State and will & truly to fulfill & perform all such duties as may be enjoined upon him by the said will, or far as there shall be properly and the law charge him, and in general to do & perform all other acts which now are or hereafter may be required of him by law -

Witness John V. A. Hays, Probate Justice of the peace of the said County of La Salle at his office in Ottawa this sixth day of September in the year of our Lord 1839 John V. A. Hays ^{Probate} Justice of the peace &c.

All which we have caused by these presents to be exemplified and the seal of our County Court of La Salle County to be hereunto affixed -

In testimony whereof Samuel W. Raymond Clerk of the County Court of said County has hereunto set his hand and affixed the seal of said Court at Ottawa this 28th day of December A. D. 1853.

 S. W. Raymond. Clerk

Copy of deed from John Farghonsler executor of Samuel Lapradey deceased to John Severson
"C"

This Indenture made this second day of

October one thousand eight hundred and forty one
between John Fanger executor of the last-
will & testament of Samuel Lapley deceased
of the County of La Salle and John Swanson
& Mary Swanson late of the County of Stephenson
of the second part witnesseth that the said
party of the first part in consideration of the
sum of Fifteen hundred dollars to him duly
paid hath sold, and by these presents doth
grant and convey to the said parties of the
second part all that certain tract or parcel
of land situate in the County of La Salle
State of Illinois to wit: The West half of the
North West quarter of Section fourteen (14) in
Township thirty three (33) North Range One (1)
East of the third Principal Meridian, excepting
& reserving therefrom that portion of said quarter
section laid out into town lots for said Samuel
Lapley now deceased by Jas H. Rees surveyor
reference being had to a plat of said town
now in possession of the party of the first part
will more fully appear. Also the equal undiv-
ided half part of the East half of North West-
quarter Sec. fourteen (14) in said Township
thirty three (33) North Range One (1) East of the
said third principal meridian, with the appur-
tenances, and all the estate title and interest

appeared John Faughender to me personally known as the real person who executed the instrument deed and acknowledged that he executed the same as his voluntary act and deed for the uses and purposes therein contained.

Given under my hand and seal this 2nd day of October A. D. 1841

H. Leonard, J. P. *(L.S.)*

Filed Oct. 4th 1841.

Benton Ayres was then called as a witness and testified as follows: The plaintiff objected to the witness 1st because he was incompetent, 2nd because his testimony was not competent to prove the facts testified to by said witness; the Court overruled the objection & the plaintiff then & there excepted -

The witness testified, I am one of the parties named as executors of the last will of Samuel Leapsley within a few days after the death of said Leapsley. William Wadclingham and John Faughender and myself took the will & came up to the office of John V. A. Kees who was then Probate justice of the Peace of La Salle County; when we came up I had fully made up my mind not to serve as executor of the will, but I supposed Wadclingham and Faughender would serve. The will was proved and

opened & read. Wadsworth was very much
 offended at the terms of the will, and after the
 reading of the will, the Probate Justice asked us if
 we would act as executors, Mr. Faughnelder
 agreed to do, but I absolutely refused to serve
 as executor of the will and Wadsworth also
 absolutely refused. I was surprised at his refu-
 sal and afterwards tried to get him to accept.
 but he declared that he would not with an oath.
 This was in Hays office but consummation not
 addressed to him. I never withdrew my refusal
 and never did qualify as executor of the will of
 Samuel Lapley and did Wadsworth to my
 knowledge. Very soon after Wadsworth left for
 St. Louis, and I do not know that he was ever
 here afterwards. He died three or four years ago.
 At the time we all brought the will to Hays, the
 will was deposited but not proven. the Probate
 Justice took measures to bring in the witnesses.
 witnesses resided at La Salle since 1830 a near
 neighbor to Lapley. Knew Mary Christelle, she
 was Lapley's sister. Knew her children Frederick
 Christelle & the other legacies of the will. Frederick
 was about 3 or 4 years old in 1838. Some were older
 & one or two younger. Since over to witness in La
 Salle. Don't know that they have received their
 legacies, thinks he would have known it if they

fact. Faughomeler lived here till 1845-6 or 7 and then he went off from the State. Wadsworth was a brother-in-law of Leapeley's. lived in St. Louis. The will of Samuel Leapeley set out in the agreed state of facts and the probate thereof was read without objection by defendant. Defendant then called Samuel M. Raymond who testified as follows - I was County Clerk of La Salle County and keeper of the books and records of the Probate office of said County. A book was here shown witness who testifies that it was the book of entries of the doings of the Probate Justice of the Peace of said County for the year 1839. Defendant offered in evidence an order in said book, by which it was ordered by the Probate Justice of the Peace of said County that that letter testamentary on the estate of said John Leapeley should be granted to John Faughomeler which order was made Sept. 6th 1839 which order was as follows

John Faughomeler
Executor of the last
Will & Testament of
Samuel Leapeley
de^{ce}

} Applications for letters

} This day came the said
John Faughomeler one of the
executors named in the will of the said Samuel

Lapsley deceased heretofore proven and admitted to record, and made application for letters testamentary. It appearing that the said Lapsley is dead, that the other persons named in said will as co-executors decline acting, and that the said applicant is entitled to Letters as sole executor of said will, and the said applicant having filed in this office the requisite Bond with satisfactory security, Letters testamentary are therefore granted to the said John F. Angbomder.

The defendant then offered in evidence a bond after proving by said Witness Raymond that the same was the bond given by said F. Angbomder as the executor of the last will and testament of Samuel Lapsley deceased which was in the usual form & dated Sept. 6th 1839. Defendant then called John A. Hord who testified that he was Probate Justice of the Peace of said County during the year 1839 and that the entry aforesaid in the book of entries dated Sept. 6th 1839 was in witness bond writing, a written memorandum which had previously proven by witness Raymond to have been on file in said Probate Office among the papers belonging to the estate of said Lapsley was here shown to the

witness which memorandum is as follows -

Letters testamentary - copy of will with letters -
other executor named in will decline to qualify -
John Faughandler sole executor

Richard Merrill

Daniel Linnick Affirmation

Michael Leonard

enclosed mem Sept 6 1839

The witness after examining the above papers testified that the same was in his hand writing. He also testified that the will of Lapley on file in the probate office was enclosed in his hand writing also the affidavit attached thereto, that he was acquainted with Bertha Ayres and John Faughandler and that it was his best impression that Bertha Ayres and William Wadlingham did appear to qualify as executor of Lapley's will, that such was his best recollection gathered from the papers and memoranda made by himself of the ~~transaction~~ at the time and from his general recollection of the transaction and of what occurred before the letters were issued to Faughandler. The defendants counsel then asked the witness to state what was the ordinary course of business in 1839 in the Probate office as to whether the record book was made up in -

immediately upon the action of the Probate justice
 or subsequently, and if subsequently what-
 means were usually adopted to preserve a
 history of the transaction. The plaintiff ob-
 jected but the Court suffered the same to be
 asked subject to be excluded by the if it
 should so. Witness testified that in 1839 his
 custom was when executors administrators or others
 appeared before the Probate justice to transact
 business relating to an estate to take down
 the papers on file in that estate and to make
 a memorandum of what was done on that day
 and to file the memorandum with the papers
 and the date wrote upon the memorandum
 to show at what time the business was done.
 the memorandum with the files ever then laid
 together & laid away, afterwards the records were
 written up from these memoranda at his
 house. This paper (the memorandum above
 set forth) was such a memorandum of what
 had been done in the matter of the estate of
 Samuel Lapley on the 6th day of Sept: 1839 -
 The memorandum was read in evidence, said
 witness Hays testified that the personal estate
 of said Lapley was insufficient to pay the
 debts of said estate, that Pangborn did
 pay some of the debts to his knowledge,

On cross examination by the plaintiffs counsel the witness Hoar testified that he derived his impression that Ayres & Wadsworth have refused to qualify as executors from the papers and from his general recollection of the transactions and his (witness's) course of doing business as probate justice. That he may have been informed by Boston Ayres at the time, that he (Ayres) would not qualify, that he could not say that he knew Wadsworth. That he (witness) had reliable information of Ayres & Wadsworth's refusal to act as executors, at the time he (witness) issued letters to Faughandler but that he could not say now how he derived such information.

On direct examination resumed the ~~witness~~ witness Hoar testified that he had no doubt about the fact that he did derive his information as to Ayres and Wadsworth's refusal to qualify from some other source than from Faughandler - that he should be inclined to think that they (Ayres & Wadsworth) appeared before him in person - in that case no other memorandum would have been made except the memorandum above mentioned and set out.

Philo Linsley testified that after Lapsley

death he talked with Burton Ayres about serving as executor of Lapley's will. He told Ayres that he thought he ought to do it, but Ayres said Lapley's business was so mixed up that he would have nothing to do with it. Can't tell whether this was in 1839 or 1840. He talked with him frequently and Ayres always expressed the same opinion.

The defendant then proved & read in evidence the inventory of the Estate of Samuel Lapley as follows:

Inventory of Debts due the Estate of Samuel Lapley deceased.

		\$302		%		good	
Julius C. Cox	Proli ex. sale	4	-			doubtful	
John Cady	ex	8				doubtful	
Wm Richardson	"	18	88			do	
Fleming Walsh	"	2	00			"	
Samuel Beard	"	41	50			doubtful	
Samuel Cosgriff	"	14	40			do	
Wallace		12	00			good	
Adam Gorman	Collected	5	-			doubtful	
Joel Gurley	Proli	5	-			doubtful	
James Hoays	ex	5	-			doubtful	
O. C. Motley	"	1	25			do	
James Stewart	"	8	75			good	
John Cook	-	2	00			do	
A & J O'Connor	-						

6

Jas Webb	apc	— paid	138	good
Wm Bayne	"		8 25	desperate
Cornel Section No 195	"		65 00	do
Berry Glass	"	collected	1 64	good
Spaulding & Kniny	—	Bal. due	50	desperate
H Spalding	apc			do
N C Phillips	"		36 06	"
Kniny & M ^c Martin	"		543 93	"
H. L. Kniny & Co.	"		1073 77	"
H. L. Kniny	—	"	13 75	"
Kenny Cuscut	"		7 50	"
W. H. Merritt	"		86	"
W ^m A. Baldwin	"	paid	3 50	good
Leon ^d Stephens	"		16 19	doubtful
David Smith note (run away)			28 22	"
Judgment in C. Court of Lo. Salle Co vs Roger Skinner dec ^d				doubtful
Judgment in de. vs State Ill.			100 —	good in part
James Myers Cash lent.			100	doubtful
Thos M Hennessey — apc			191 89	approved to be collectable
Amount from Execution sale			122	
Judgment against Roger S. Skinner and Samuel Smith			26 11	doubtful
Olyvier Spalding	—		1000 00	do.

Real Estate

Deed from A. G. S. Wright dated Jan'y 21st - 1836,
for 370 acres of land -

Aln North West-quarter of Section 14. T. 33, R. 1, East-
of 3^d P. M.

South West-quarter same section (in dispute)

John Fanchamden

Executor -

Filed May 1st 1841 & approved

Jm. V. A. Hues

P. J. P.

Heard Lapsley frequently speak of his property
in Dec 1836 he had a sale that brought in
\$1200, he claimed to have \$6000 - in St. Louis -
he loaned M^c Martin \$350 - He loaned \$1000 - in
Peru which he did not get, he said he had \$800 -
in Detroit. I did not know much about him
after Spring of 1838, he was a monstrous talker,
talked a good deal, a good deal was fact & a
good journey. I don't know what he valued all
his real estate at, he valued the mill &c, W 1/2 N W.
1/4, 33. 1. at \$2400 - He claimed other lands,
Knew the Lapsley children the legals in the will
the oldest was 10 or 11 years old in 1836.
Second, the appraisement bill of said estate as
follows:

The following is a list of the valuation of property

belonging to the estate of the late Samuel Leapsley
deceased, a resident of Lea Salle County Ill.

The meadow with the fence surrounding it including
the buildings within it — — — \$320.00

The fruit trees within the above mentioned
meadow three apple trees two cherry trees —
and one bunch of currant bushes excepted 25.00

Rails around the potato ground at three
dollars per hundred amounted to thirteen
hundred — — — — — 39.00

One waggon shop — — — 20.00

One long stable — — — 10.00

One Spring house — — — 4.00

Two log chairs — — — 5.50

Two Reggs and one four plane — 1.50

Three Corn boxes — — — 1.00

Two sugar boxes, one auger & one chisel — — 1.75

Four bed blankets — — — 3.50

Two Coats — — — 6.00

One spade and one hat — — — 1.50

Two candlesticks, one pair of tongs, one bit, one
pitcher, one slate and one powder horn 1.50

One empty barrel — — — 25.

One two inch auger & one ladder — — — 1.50

One bar of iron, one hammer & one hammer chain 5.50

Lea Salle October 1st 1839

We do hereby certify that the within is a true list of appraisement of the property within described belonging to the estate of Samuel Leapsley deceased as witness our hands & seals this 1st day of October 1839

Daniel Linnick *Seal*
 Michael Linnick *Seal*
 Hockiah Merritt *Seal* } Appraisers

Filed March 23^d 1840.

approved J. V. O. Hays

P. J. P.

Shed on account current rendered to the Probate Court in 1847 by John Hauglander as executor of said Estate as follows:

John Hauglander Executor of the Estate of Samuel Leapsley deceased in account with said Estate to wit: the said executor charges himself with all being returned in favour of said Estate, and credits himself with all being paid out by him which is as follows to wit:

Do. To amount of sale of P. Property	\$420.00
Do amt. rec'd from the sale of R. estate sold to John Swanson	15.00
Do Amt. rec'd from sale of Town Lots	273.00
	<u>2193.00</u>
Do amt. collected from inventory on file	20.02

To amt rec'd from sale of land, scrips
 one hundred and thirty dollars, sold for
 28 cents on the dollar

36,68
 \$ 2249,70

Cr.

By Cash paid Benjamin Hers for R.	50,00
" " " John Campbell " "	8,50
" " " Julius C. Cox " "	8,25
" " " Lo Leclerc clerk	1,00
" " " Wills & Mulford for R.	125
" " " James Cunningham	73,00
" " " David Smith	2,75
" " " Lo, Leclerc	10,00
" " " T. L. Lickay for R.	10,00
" " " Davis & Sears " "	8,00
" " " Wm Reddick as sheriff	23,00
" " " John Swanson	2,00
" " " Jas. W. Armstrong	1,93
" " " Wm Reddick collector	1,40
" " " John Shultz for R.	2,00
" " " Julius C. Cox " "	50,00
" " " James Cunningham	75,00
" " " Wm Reddick sheriff	210,00
" " " Daniel Lemmick for R.	4,75
" " " Michael Leonard	2,75
" " " R. M. Chumack	1,40
" " " W. J. Case	10,00
" " " S. Lingley	10,00

By cash paid Waipin Lomely on Intl-	101, 00
" " " L. R. Woodruff Jr James Campbell Jr Receipt	75, 00
" " " Wearn & Hoar	2, 75
" " " Lickay & Lelomel	5, 00
" " " L. Lelomel	5, 00
" " " John Black	1, 75
" " " Hackelish Merritt	75
" " " W. J. Cox Jr R	15, 00
" " " H. Wood " "	56, 43
" " " J. V. A. Hoar	20 00
" " " H. Hurlbut receiver	1, 75
" " " Dennis Manning	2 00
" " " O. Peters	15, 00
" " " H. S. Beebe	5, 00
" " " Saml. Leugley	15, 00
" " " John Retin	3, 35
" " " L. Lelomel Clk	1, 75
" " " W. Reddick	2, 81
" " " George H. Harris	5, 00
" " " L. Lelomel	5, 00
" " " James Cunningham	20, 00
" " " J. Campbell Jr W. L. Lelomel	5, 00
" " " W. Merritt	8, 50
" " " L. Lelomel Jr R.	171, 13
" " " Jas. Cunningham	10, 00
" " " Julius C. Cox Jr R.	10, 00

Credits brought up	\$1204. 95-
To John Faughamela on note	103 , 66
" " " as per centage and other expenses as per bill on file shows	118 , 66
To Probate Justice Leaskin	8 , 56
" as loaned for	<u>3 00</u>
	1658 81 cents

Recapitulation

Dr. Estate	\$2249, 70
Credit	<u>1438, 81</u>

810 .89 cents Ballance-

Ballance in the hands of Executors up to this time
the executor has been allowed his percentage
& other expenses up to this date. He reports that
the B. of the inventory on file of the note and ac-
counts cannot be collected to the best of his
knowledge

May 12th 1847

John Faughamela

Executor -

Filed May 12th 1847 and recorded & approved of May 12th 1847.

Fourth: Entry in the accounts book of the Probate
Court approved in 1847, approving of the account
current as follows:

May 12th 1847

In the matter of } account-current
Samuel Leasky deceased }

This day came John Faughander executor of the estate of Samuel Lapsley deceased and exhibited an account current of his executorship of said estate which after being examined was approved of and placed on file -

Defendant read in evidence Letter Testamentary issued to John Faughander.

Defendant then proved by witness Raymond that there was on evidence in the files & records of the Probate office, that either Ayres or Wadsworth had ever applied for letter Testamentary as executor of Lapsley's will.

Plaintiff proved by some witness, that there was on evidence in the records of the Probate Court, that any citation ever issued from said Court to Ayres or Wadsworth to appear and qualify as executor of Lapsley's will. Lorenzo Deland testified, that he was Lapsley's Attorney & acquainted with his affairs. That he did not leave sufficient personal estate to pay his debts and legacies. A copy of ~~the~~ citation issued from the Probate in 1848 to John

Faughander was read in evidence as follows:
 State of Illinois }
 De Kalb County } The People of the State of Illinois to
 John Faughander administrator of

all and singular the goods, chattels & personal
estate of Samuel Lapsley dec^d. Having,
You are hereby required to appear before our Probate
Court in and for our said County of La Salle
at the office of the Probate Justice in Ottawa on the
15th day of April 1848 at ten o'clock in the forenoon
to render an account of your proceedings in the
administration of the estate of Samuel Lapsley
deceased, or show cause why an attachment
should not issue against you - and to answer
the application of James Cunningham a creditor
of the deceased.

In witness whereof Henry G. Colton
Probate Justice in & for said County of La Salle
has hereunto set his hand and affixed his
seal of office this 5th day of April 1848
Henry G. Colton

Executed this writ by reading to John. Farvender
April the 12th 1848.

J. S. Simpson Const;

Serv & Ret. 25^c

Mileage 15^c 75^c

\$1.00.

This was all the evidence -

The Court found the issue for the Plaintiff
which finding the defendant then and there
excepted. The defendant moved the Court

for a new trial, which motion was overruled
by the Court; to which decision the defendant
then & there excepted & prays that his bill of
exceptions may be signed sealed & made
part of the record, which is done.

M. E. Hollister *Recd*

Judge.

Let it be filed as of the proper time

M. E. C.

To Judge Hollister

On the part of plaintiffs I
consent that this may be signed as a *Correct*
Bill of Exceptions, and filed as of the proper time
E. S. Holbrook

For Mr. Howell et al
vs

Orin Wendell

Filed March 9, 1860

as of February Term 1860

A. B. Brown

Clerk

tho' day of May 1860

\$6.00 fees for copying bill of exception found for Wardlaw by
Kollintu

State of Illinois
La Salle County vs I Absalom B Moore
Clerk of the Circuit
Court in and for Said County do hereby
Certify that the above and foregoing is a true,
full and complete record of the proceedings
had in the above entitled suit, as appears
from the papers on file and the Records of
my Office.

Witness Absalom B. Moore
Clerk of the Circuit Court in and
for Said County, and the Seal of
Said Court at Ottawa this 18th day
of April A.D. 1861

A. B. Moore Clerk
C. H. Hook Deputy

~~700~~
= 28

Orrin Wardwell
vs
Lane McDowell
et al



Transcript of Record

Filed April 18th 1861
L. Leland
Clerk

Dickey
to
be filed -