

12393

No. _____

Supreme Court of Illinois

Clinefetter, et al.

vs.

Ayres.

71641  7

26

Henry Clivefetter Ital.
us

Burton Ayres

26

12393

1854

Clinefelter vs Ayers.

Syden on powers from 121 to 147 inclusive
4 Greenleaf Cruise 148. note -
4th Kent - 526 - 527 -

Power well executed - ^{4th} Dane's Digest Chap
135 - Art 6. Sec 1. Sec 7. Sec 30 -

The power to sell in this will is not a naked power - but is a power coupled with such interest & ^{enforceable} trust - that if no donee of the power had been named - it would have vested in the acting executor -

No case is produced where such a power - was executed by a sole executor was held insufficient -

1. McLean 197 - conveyance was by an attorney

3. Vermont - 197 - The will vests the estate in ^{three judges who were named executors} and it was held that one cannot convey -

3^d Day 184 - In that case the legates took the same interest, whether sale or not - no sale was made - and executor claimed possession vs heir - held in favor of the heir -

4. John Ch. 368 - That will was such that by this test ^{only was conferred} was a naked power - sale was by attorney - held invalid

3 Bible 330 - will left it to his executors to sell or exchange his lands - but not to pay debts or legacies - ~~sale~~ held a naked authority & one of several executors can not sell - also that case is not covered by Kentucky Statute -

4 Bible 307 - Will is not given in full ^{in report} but the mere right to sell is declared a naked power

7. Dana 1st Under that will the devisees take the same whether sale or not - (see language [7 & 8] of Judge)

Judge Robertson { The power being discretionary & no (page 9) enforceable trust - sale by one held back - Had testator directed a sale ^{at common law} would have been good

The question is at least one of intention

3rd - J. J. Marshall - 248 - Will gave land to wife & ^{unequally} but to daughter - to be sold by ex^r if necessary to pay debts - one executor qualified & sold - Sale held good -

at Common law ~~deceased~~ states -

also within Kentucky statute -

2nd Little 110 - Devise residue of estate to wife & children - was a naked power by the test we insist upon - & sheds no light on this point -

4, E. Com. L. 289 - Is a case of trustees & not executors -

16. Vesay - 45 - This was a devise to two by name (who were named executors) upon certain trusts - directing said "trustees & executors" to pay out of same certain legacies - & to find out his Kin generally & distribute the same & as they pleased -

19 Vesay 17 - Devise to executors A. B. & C. or the survivor thereof in trust -

8 Cowen 554 - Devise to A. B. & C. as joint tenants in trust - at bottom page 553 "at Common law these executors are authorised to sell ~~survivor may~~"

3rd Cowen 654 - Devise that executors - (3 appointed) sell land - to pay two legacies &c - it turned out that one of the legatees was (witness to the will & the other had died) sale afterwards by two executors was held bad - because the purpose of sale had ceased before sale -

5. Chitcalp 462 - Will devised most of his land specifically & authorised his executor to sell residue - Ex^r qualified - one resigned his office - & the other Ex^r sold to him - held a naked power unless necessary to perform other parts will if so not a naked power -

5 Met- 466 - What is a naked power stated by J. Hubbard - showing this test to be the true one - 467 - Naked powers to be construed strictly, those coupled with a trust are to receive a liberal construction -

2. John Ch- 22 - (18 to 21 inclusive read) Takes this distinction touching naked powers - & ~~enforces~~ sustains the power of a sole executor to sell among other points - on the ground of an enforceable trust - touching proceeds of sale - Intention testator gives latitude to construction

10 Peters 563 - Common law distinction touching naked powers - & those coupled with an intent or enforceable trust - This will directee lands to be sold to pay debts - naming no donee of the power - appointing Ex^d - held the sole surviving executor might sell - Dictum in 4th Gill & Johnson 323 held not law -

4th Sanfard - 400 - Is a case of a sale by adm^r with will annexed - under power in will to executors -

3^d - Rawle 393 - Will authorises³ executors - ~~renunci~~ ation - to sell to pay debts & legacies 2 took executorship - the other did not renounce - Sale by two - without her concurrence of the third - passed no title -

In England - The proving of the will - by one of several executors - was good as to all - and all suits, in autre droit - had to be brought in name of all executors named in the will even tho a part had renounced or refused to act - Those acting had to act in the name & in behalf of all - 1st Chitry Pleading 19

9th power given to executors - may sell the property if they renounce
English 139
Sec 32

B Rawle 394, 395 - ~~Not so in this state~~
4 Bacon 54 - may file bill before probate 64 -
A person therefore named in the will as an executor - became so by the proving of the will - whether by his own act or another

Not so in Illinois - Gale's Statute page 691. Sec 25. 26. 27. 61. - Before entering upon duties to give bond - take oath & take letters testamentary -

In Statute of wills singular number to stand for plural - & males for females Sec 72 -
Sec 89 - Treats of powers to sell lands in will - this is to be read in connection with Sec 71 -

The Term executors then in this will means
such persons or persons as may under this will
and the laws of this State be clothed with this
office - The purposes of the power will require
this construction otherwise the will of the testator
fails -

If this will instead of directing executors to sell
- had merely directed - that all the real estate
of testator should be sold - In such
case - ~~the~~ sole acting executor would
have taken the power by implication

Snyder on powers - Law Library 1-4th
Series page 150, 152 - 153 - 15, John 346
3. Bunnay 69 - 4 Manf. 232 2 Johns Chm -
20 - 4th Kent 326, 328 -
4th

Chinepelt
as
Ayers

Dickey's points
& authorities

Blindefetter & wife }
vs } Exponent
Ayres.

E. I. Holbrook, for Plaintiffs.

The deed of Langhender should not have been admitted in evidence. It is not a valid execution of the power contained in the will of Lapsley, which is a joint authority to three persons to sell, or lease, or otherwise convey, his real estate, at such time, and in such manner, and upon such terms, as to ~~spare~~^{price}, credit, &c. as they might think proper, for the purpose of paying debts, and legacies.

I This is a conveyance authorized only by the Statute, and the rule in such case is, that every material requisite of the Statute and of the will should be strictly complied with, and the Statute only makes good and valid sales made "in the manner and by the persons appointed, in the will."

An authority to three, to convey, gives no authority to one. Expressio unius est exclusio alterius. This affirmative.

proposition contains, within
itself, a negation of the converse
of the proposition. A statute di-
recting, or authorizing, a thing
to be done in a certain manner
implies that it shall not be
done in any other manner.
In matters of private concern, or
affecting private interests, all
those appointed to perform a duty
must join in its execution.

2 Bl. Com. 501. } Revised Stat.
4 Kent's Com. 504. } Little, Wiles, Sec 89.

Smith et al vs. Hileman 1 L. R.
323.

United States vs. One Case of Hair
Pencils 1 Paige 405.

Green vs. Miller 6 John Rep. 41.

2

Neither is it a valid execu-
tion of the power at Common
Law: for this requires all ^{the} donees
of the power that are alive to
join in the conveyance: and
the rule is the same, if those who
are appointed executors, are made
^{also} donees ^{also} of the power. The doctrine
of survivorship, as all those au-
thorized to convey ~~were~~ were still
alive, has no application to
this case.

4 Cruise (by Greenleaf) note. 148.

1 Eng. on Powers 134, 319.

Powell on Devises, 293

4 Kent 326

1 Knapp's Dig. 137

2 Story's Equity 321.

4 Domes Dig. ch. 1. a. 15. 29.

- - - 107 - 1.

- - - 135 - 6.

Bergen vs Bennett. 1 Barnes Cases 15

Jackson vs Chamber 7 Cowen's

Nap. 187.

3. The Statute 21 Henry VIII ch. 4.
if in force in this State does not
affect this conveyance. At the
time that act was passed, real
estate ~~was~~ ^{could} not ~~then~~ be devised.
and at no time prior to the
fourth year of James 1st could
that kind of estate which the
testator had in the premises be
devised, or aliened by virtue
of a power contained in a
will.

2 Bl. Com. 375-6

Penny vs. Little et al, 3 L. Rep. 304.

Hall vs Owen 2 Ld. 181

4. But this Statute, if once in force
in this State has been repealed.
The provisions of our Statute
of Wills of 1829 are inconsistent
with the English Statute, and
the rule in such case is that the

Last law shall prevail. It is also
~~ex~~ All laws inconsistent with
the provisions of our Statute are
expressly repealed by the 140th Sec.

Our Legislature have reversed
the whole subject matter, and
passed an entire body of laws
or system of laws, and this is an
implied, or constructive repeal
of all anterior laws on the same
subject. There is an implied neg-
ative of all that is not embraced
in the new statute: and partic-
ularly is this the case, if parts
and sections of the old are re-en-
acted, while other parts are omit-
ted. These omissions will be pre-
sumed to have been made de-
signedly, and Statute omits the
provisions of the English Statute
under which Faragher seems
to have acted.

United States vs One case of Hair Pencils 405
Bailett et al vs King, ex. 12 Mass 545
Towle vs Barrett. 3 Greenl. 25
Gorkham vs Lockett 6 Bellou. 151. et seq.
Pulaski County vs Downe. 5 English 588
Trustees of Canal vs Chicago 14. Ills 334
- Dugan et al vs Gettings & wife et al. 35 Ill 154
Ellis vs Paige 1. Pick. 45
Goldman vs Boston 20 Pick. 410
Commonwealth vs Kimball 21 do. 373
Michoud, quilm, vs Squin 5 do. 168

McCarter vs Cyprian Asylum 9 How. 437
Williams vs Porter 2 Barb. 316
Davis et al vs Fairbairn et al 3 How. 1636
8 Friends & Steinshall 9.
Devunis on Stat. 673

5 But if it be held that the Eng.
Stat. is still in force in this state
and that it applies to cases
of ~~fee~~ conveyances of estates in fee
simple absolute. Still I urge that
it applies only to those cases
where the sale is absolutely com-
manded for a certain purpose
and the duty is simply minister-
ial: and not to those cases where
the terms expressly point to a joint
execution of the power by the
donees: and personal confidence
^{is placed} in their integrity: or in their judg-
ment and discretion as to the sale
: the kind of conveyance: or the time,
mode, manner, or extent of the
sale: or in the use, distribution, or
safety of the purchase money: and
besides, that the acting executor,
under this law, is vested with no
authority over the real estate, unless
the co-executors upon citation or
otherwise, appear in person, in open
court: and refuse to take upon them-
selves the execution of the will, &
this is entered of record.

Pearson vs Darnison 1 McLean 197
 Bull vs Bull 3 Day 384
 Williams vs Murray ^{Ad} 3 Ves. 197
 + Berger vs Duff 4 John ^{Ch} Rep. 368
 + Green vs Miller 6 " " 41.
 Powell et al vs Tuttle et al 3 Comst. 399
 Woldridges Heirs vs Watkins Ex. 3 Bibb 350
 Darnison vs Smiths ex. 4 Bibb. 307
 Clay & Craig vs Hart. 7 Dana 9.
 Coleman vs King 39 A Marshall 248.
 + Loyds Heirs vs Johnson et al 2 Hottel 116.
 Townsend et al vs Nelson 1 Barn. & Ald. 612.
 Cole vs Wade 16 Ves. 45
 Weather vs Maunde 19 Ves. 17.
 Sinclair vs Jackson 8 Cowen 544
 Sharpsteen vs Tilton 3 Cowen 654
 + Shelton vs Howe et al 5 Metcalf 462
 + Cogood vs Franklin 2 John Ch. Rep. 22.
 Peters vs Beverly 10 Petus 534
 + Neill on Trustees 472. 478. 501.
 + Landf. Dominick vs Michael 4 Landf. 400.
 Wall vs Erwin 2 Gil. 176.
 Heron vs Hopper 3 Keble 393.

6 With the adoption of the Eng.
 Statute, we adopt the English con-
 struction ^{of it} which is, that those who
 were appointed by will to convey
 real estate, whether executors or
 others could sell without probate
 of the will, and without taking
 out letters testamentary. The fact
 then that Farnham took out let.

ters revoked no supersede of the others, and did not place him in any better position than the other executors, or either of them, or than they are now, to convey the real estate of the testator. Our Statute only requires that the sales shall be made "by the persons appointed"

The donees of the power are trustees, and, though the same be executors, they do not convey the land as executors but as trustees. When the trust commences, then the office of executor ends, and although Ayres, Fanchender, and Waddingham, were appointed executors, and under the law any one might act, ^{and perform the ordinary duty of executor} yet as donees of the power, (this being a matter of personal confidence), no less than all could act while all were alive.

Hall vs Edwin Supier.

7 Again Fanchender, in his deed, did not refer to his authority:

The sale should have been at public auction, and it should so appear,

The purchaser was bound to see to the application of the purchase ^{money}, which was not done, and the legacies are unpaid.

And the defendant, Bentin Ayres, the trustee, the "friend" on whom the testator relied to preserve his estate and distribute his ^{property} estate, is not a bona fide purchaser.

Chesfeller & Weise

^{as}
Bristol Ayus

Brief and
Authentic of Hops.

For the Court.

STATE OF ILLINOIS,

Supreme Court,

ss.

The People of the State of Illinois,

To the Sheriff of the County of *La Salle* - Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the circuit court of *La Salle* county, before the Judge thereof, between *Henry Clunifetta & Mary Clunifetta* plaintiffs & *Burton Ayres* defendant,

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

as we are informed by *their* complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said

Burton Ayres

that *he* be and appear before the Justices of our said Supreme Court, at the next term of said court, to be holden at Ottawa, in said state, on the *2^d* Monday in *June* next, to hear the records and proceedings aforesaid, and the errors assigned, if *he* shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said *Burton Ayres* notice, together with this writ.

WITNESS, the Hon. Samuel H. Treat, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *25th* day of *May* in the Year of Our Lord One Thousand Eight Hundred and Fifty-four.

L. Leland

Clerk of the Supreme Court.

STATE OF ILLINOIS

26

Henry Cliefelter et al.

Burton Ayres

Sci Ja.

La Salle County

Executed this Mithy
Reading the same to
the Within Named

Burton Ayres
Jan 1st 1854

R Thorne Sheriff
for F Warner Deputy

Sw & Ret 60
15 minor 75
\$135

Filed June 2 - 1854
V. Veland Clk.

[Faint, mostly illegible text, possibly bleed-through from the reverse side of the page]

[Faint vertical text, possibly a date or reference]

[Faint vertical text, possibly a name or title]

[Faint vertical text, possibly a signature or name]

STATE OF ILLINOIS,

Supreme Court,

ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the county of *La Salle* - Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of *La Salle* county, before the Judge thereof, between

Henry Clinfetter & Mary Clinfetter

plaintiffs, and

Burton Ayres

defendant - it is said manifest error hath intervened, to the injury of the aforesaid *plaintiffs*

as we are informed by *their* complaint, and we being willing that error, should be corrected if any there be in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of *La Salle*, on the *2^d Monday in June* - next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law;

It is so ordered.

WITNESS, the Hon. **SAMUEL H. TREAT**, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *20th* day of *May* in the Year of Our Lord One Thousand Eight Hundred and Fifty-four.

L. Deland Clerk of the Supreme Court.

26

Wut & Feuer

Filed May 25, 1854,
J. Veland (atk).

STATE OF ILLINOIS

State of Illinois 
LaSalle County 

Was before the Honorable Edwin
J Leland Presiding Judge of the
North Judicial District of the State of Illinois at a
Circuit Court Commenced and held in and for the
County of LaSalle at the Court House in Ottawa in
said County on Monday the first day of November
in the year of our Lord one thousand Eight hundred
and fifty two

Present

The Honorable Edwin J Leland
Presiding Judge

Be it remembered that on the 5th day of November
1852 Henry Clinefelter by his Attorney filed in the
Office of the Clerk of the said Circuit Court the
following Declaration in Ejectment:

State of Illinois 
LaSalle County 
In the Circuit Court
For the Nov Term AD 1852

Henry Clinefelter and Mary
Clinefelter his wife by E S Holbrook their Attorney
complain of Burton Ayres, for that whereas the said
plaintiffs in the right of the said Mary Clinefelter on
the first day of January AD 1852 were possessed of
one undivided North part of a certain tract of
Land with the appurtenances situate in said County
being a part of the North West quarter of Section
Fourteen Township Thirty Three North of Range One
East of the 3^d principal Meridian and bounded as
follows commencing at a point on a line dividing

Sections Fourteen and Fifteen of said Township nine hundred and twenty eight feet North of the Southwest corner of said section Fourteen thence North seven Rods and a half - thence East three hundred and sixty feet thence South seven Rods and a half (to the North East corner of Lot One Block Two of Lapoly's Addition to LaSalle) thence West to the place of beginning - which said premises the said plaintiffs claim in fee as the property of the said Mary Clinefelter - And they the said plaintiffs being so possessed thereof the said Burton Ayres afterwards to wit: on the first day of October A.D. 1852 entered onto the said premises and ejected the plaintiffs therefrom, and unjustly withheld from the said plaintiffs the possession thereof to the damage of said plaintiffs of \$100 and therefore they bring suit

2^d Count For that whereas also the said plaintiffs in right of the said Mary Clinefelter were on the said first day of January A.D. 1852 possessed of an undivided Eighth part of the said premises which they claim in fee as the property of the said Mary Clinefelter and they the said plaintiffs being so possessed the said Burton Ayres afterwards, to wit: on the first day of October A.D. 1852 entered onto 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 \$100 and therefore they bring suit

E. S. Holbrook

Atty for Plffs

To Mr Boston Ayres

You are hereby notified
that the declaration with a copy of which you are
hereby served and to which copy this notice is
subjoined will be filed on the fourth day of the Term
of the Circuit Court of LaSalle County in
November next.

That upon filing the same a rule will be
entered requiring you to appear and plead to the said
declaration within twenty days after the entry of said
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 29th day of October A.D. 1852

Yours &c

E. S. Holbrook

Atty for Plfs

State of Illinois
LaSalle County

E. S. Holbrook being duly sworn
deposes & says that on the 29th day
of Oct 1852 he gave a copy of this declaration & notice
to Mrs C Ayres a white person above the age of ten
years a member of the family of said defendant at his
dwelling place on said premises that said defendant as
he was informed & believes was absent from home

Subscribed & sworn to before
me this 5th day of November 1852

E. S. Holbrook

J. Lindley Clerk

And afterwards, to wit; at the November Term 1852
of said Circuit Court the following proceedings
appear of Record. viz;

Sabbath Circuit Court November Term 1852
Friday Nov 5th 1852

Henry Clinifeltu &
Mary Clinifeltu his wife
195 vs Ejectment
Barton Ayres On Motion
of plaintiffs It is ordered that
defendants be ruled to plead in twenty days.

And afterwards, to wit; Nov 23^d 1852 the defen-
dant by his Attorney filed his plea in words and
figures following to wit;

State of Illinois
Sabbath County & Circuit Court thereof
Vacation after November Term AD 1852

Barton Ayres
vs Ejectment
Henry Clinifeltu &
Mary Clinifeltu his wife
And now comes
the said defendant by Wallace
his attorney and defends the force and injury where
and says he the said defendant is not guilty of
unlawfully withholding the said premises in said
plaintiffs declaration mentioned and described as the
said plaintiffs have in this said declaration thereof

above alleged against him and of this the said defendant
puts himself upon the Country &c

W. H. L. Wallace

Atty for Deft

& The plaintiffs do the like
by E. J. Holbrook

And afterwards, to wit: June 8th 1853 the defendant
filed the following Affidavit, viz:

State of Illinois

LaSalle County and Circuit Court thereof
May Term AD 1853

Henry Clinifette and
Mary Clinifette his wife

vs

Benton Ayers

Ejectment

Benton Ayers

Defendant in the above entitled
cause being duly sworn according to Law on oath deposes
and saith that the plaintiffs in this suit are almost
wholly irresponsible in a pecuniary point of view and
that he will be in danger of losing his costs and the
officers of this Court their fees in this cause unless the
said plaintiffs are required to give security for
costs

Subscribed and sworn to
before me this 7th day of
June AD 1853

Benton Ayers

P. Lindley Clerk

And afterwards to wit; at the May Term
AD 1853 of said Circuit Court the following further
proceedings appear of Record. viz.

Latah Circuit Court May Term 1853
Wednesday June 8th 1853

Henry Clinifeltu &
Mary Clinifeltu his wife

vs

as

Benton Ayres

Ejectment

On motion of
Defendant by Dickey & Wallace
his Attorneys. The Plaintiffs are ruled to file security
for costs herein or show cause to the contrary on or
before Saturday morning next.

And afterwards to wit; June 10th 1853 the
plaintiffs filed the following security for costs. viz;

Henry Clinifeltu &

Mary Clinifeltu

as

Benton Ayres

Suit pending in the Latah
Circuit Court May Term
AD 1853 in Ejectment.

I do hereby enter myself security for costs
in the above entitled cause and acknowledge myself
bound to pay or cause to be paid all costs that
may accrue to the opposite party or to the Officers of
this Court in this cause in pursuance of the laws
of this State
June 9th 1853

E. P. Hallbrook

And afterwards to wit; at the November Term
Ad 1853 of said Circuit Court the following further
proceedings appear of Record. viz;

Sabath Circuit Court November Term Ad 1853
Thursday Dec 22

Nancy Clinifelter &
Mary Clinifelter his wife
or as
Benton Ayres

Exigent
By agreement
of parties It is ordered
that this cause be set for trial on the fourth^{day} of
January next.

And afterwards to wit on Friday January 6th
1854 of said November Term of said Circuit Court the
following further proceedings appear of Record. viz;

Sabath Circuit Court November Term 1853
Friday January 6th 1854

Nancy Clinifelter &
Mary Clinifelter his wife
or as
Benton Ayres

Exigent
This day come
the plaintiffs by Holbrook
their Attorney and the Defendant by Dickey & Wallace his Attorneys &
by agreement of parties a Jury is waived herein and this cause
submitted to the Court for trial and after hearing the evidence
and arguments of Counsel the Court took this cause under
advisement

And afterwards, to wit; January 7th 1854 the follow-
ing further proceedings appear of Record in said
Circuit Court. viz;

Sabbath Circuit Court November Term AD 1853
Monday 7th Saturday January 7th 1854

Henry Clinifeltu and
Mary Clinifeltu his wife
vs
Barton Ayres
Ejectment
This day again
came the parties hereto
by their Attorneys and the Court not being sufficiently
advised in the premises take this case under
advisement.

And afterwards, to wit; at the February Special
Term AD 1854 the following further proceedings appear
of Record in said Circuit Court. viz;

Sabbath Circuit Court February Special Term 1854
Monday February 16th

Henry Clinifeltu &
Mary Clinifeltu his wife
28 vs
Barton Ayres
Ejectment
This day came the
plaintiffs by Holbrook their Attorney
and the defendant by Dickey Wallace & Hampton his Attorneys, and the Court
after having this cause under advisement since the last regular term of this
Court find the issues herein for the Defendant
Whereupon the Plaintiffs Counsel enter a motion for a new trial

And afterwards, to wit February 17th 1854 of said
February Special Term of said Circuit Court the
following further proceedings appear of Record. viz;

Latham Circuit Court February Special Term 1854
Friday February 17th

Henry Clinefelter &
Mary Clinefelter his wife

vs
Purton Ayres

Ejectment

This day again
came the parties hereto by
their attorneys and after due deliberation thereon had
it is ordered that the motion for a new trial be
overruled. It is further considered that the Defendants
have and recover of the Plaintiff his costs and
charges by him herein expended and that he have
execution therefor.

And afterwards, to wit, February 17th 1854 the
Plaintiffs by their Attorney E J Holbrook filed a Bill
of Exceptions in the words and figures following:

Henry Clinefelter &
Mary Clinefelter

vs
Purton Ayres

Ejectment

In Latham Circuit
Court Nov Term A.D. 1853

Be it remembered that for the purposes of the first trial in this cause the parties plaintiffs and defendant by their Counsel made an agreement in words & figures as follows, to wit:

State of Illinois

LaSalle County & Circuit Court thereof

November Term A.D. 1853

Henry Clinifeltu and

Mary Clinifeltu his wife

vs

Purton Ayers

Ejectment

It is agreed

by and between the parties

to the above entitled cause for the purposes of the first trial of said cause only

1st That Samuel Lapsley deceased died in LaSalle 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 the said Mary Clinifeltu is one of the heirs at law of the said Samuel Lapsley deceased and as such had the said Lapsley died intestate would have been entitled to one equal undivided eighth part of said premises 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 such cause.

3rd It is admitted by said Plaintiffs that said Samuel Lapsley prior to his death and while in sound and disposing state of 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 revoked altered or changed said
will

1st
That said Will was duly proven and recorded
according to Law in the Office of the Probate Justice
of the Peace of Litchfield County on the 28th day of
June 1839

2nd
That the said Boston Ayres who is defendant
in this suit and William Waddingham two of
the persons named as executors in said Will
declined to take upon themselves such Executorship
and that ^{thereupon} afterwards on the 6th day of September 1839
letters testamentary were duly issued thereon
to the said John Faughamer the other person named
in said Will as Executor by said Probate Justice
as sole Executor of said Will - A copy of which
letters are hereto attached marked "B" and made a
part of this Agreement and that said Faughamer
was duly qualified as such sole Executor and that
said Ayres & Waddingham were both alive at the
time of the issuing of said letters to said Faughamer
& at the time of the conveyance by said Faughamer
hereinafter stated but that said Ayres & Waddingham
never were qualified as Executors under said Will

6th
That on or about the 2nd of every day of October 1841
and after said Faughamer had been qualified as
aforesaid and while he held said Office of Executor
as aforesaid he as such Executor executed, acknowledged

and delivered to John Swanson & Mary Swanson the
Deed a copy of which is hereto attached marked
"C" and made a part of this agreement. And that
said Defendant is seized by regular chain of
Conveyance duly executed acknowledged and delivered
of whatever title and interest in said premises
passed by said Deed marked "C"

It is agreed and understood by the parties
to said suit that the above agreement is only for
the purpose of the first trial of said Cause and
that either party is not precluded thereby from taking
a new trial under the Statute or otherwise and
on such new trial the Cause may be tried in every
respect as though this agreement had never been
made

Jan 2nd 1854

E. J. Holbrook

Atty for Plaintiffs

Dickey Wallace & Champlin

Atty for Deft

"A"

Will

I Samuel Lapsley of the County of LaSalle & State of Illinois do make and publish this my last Will and 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 as possible out of the first moneys that shall come into the hands of my Executors from any portion of my Estate real or personal -

also - I give and bequeath to Benjamin Faughander Julia Ann Faughander and Emily Jane Faughander Children of John Faughander of said County of LaSalle the sum of One thousand Dollars each to be paid to them respectively at their respective ages of twenty one year or days of marriage which shall first happen the same to be put out to interest at the discretion of my executors and the interest accruing thereby to be applied to their education and maintenance respectively until their said respective ages or marriages, and if either of them shall die before the age of twenty one year or marriage then I give the share of the one so dying unto the survivor of them.

also. I give and bequeath unto Julius Q. Coe the sum of One thousand dollars as well for the respect which I bear towards him as for his kindness and attention to me during sickness.

also. I give and bequeath to Martha Cliniffelt Margaret Cliniffelt - Frederick Cliniffelt - Eliza J. Cliniffelt and Lucinda Cliniffelt, Children of my sister Mary Cliniffelt the sum of One thousand Dollars each, to be paid to them respectively, at their respective ages of twenty one year, or days of marriage which shall first happen the same to be put out to interest at the

discretion of my Executors and the interest accruing thereby
to be applied to their education and maintenance respectively:
until their said 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 and 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 on
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 and punctual payment thereof and to
effectuate this my intention I do hereby vest in my
Executors full power and authority to dispose of my
real Estate in fee simple, or for a term of years or other-
wise in as full and large a manner in every respect as
I could myself do if living—

And I do ^{hereby} make and ordain my friends Barton
Ayres, John Haughanda and William Waddingham
Executors of this my last Will and Testament.

In witness whereof I Samuel Lapoly, the
testator have ^{to} this day 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 nine

Signed published and declared
by the above named Samuel Lapoly
at ^{for} his last Will and Testament in presence
of us, who at his request have signed
as Witnesses to the same (The Words
"Julia Ann" Haughanda ^{were} written &c)

Samuel ^{his} Lapoly ^{testator}

before signing
Lorenzo Leland of Ottawa
Naron Gunn

Proof

State of Illinois
LaSalle County

On this 2^d day of July AD 1839
before me John V. A. Hoos Probate Justice
of the peace in & for said County appeared Lorenzo Leland
and Naron Gunn two Credible Witnesses who being by
me duly sworn depose and say that they were present
and saw Samuel Lapsley sign the within Will in his
presence and that the said Samuel Lapsley acknowledged
the same to be his act and deed - that they believe
the said Testator Samuel Lapsley to be of sound mind
and memory at the time of the execution of the
within Will by him

Subscribed & sworn to
before me this 2^d day of
July AD 1839

Lorenzo Leland
Naron Gunn

John V. A. Hoos Probate Justice &c

Letters

"B"

State of Illinois
LaSalle County

Illinois

The People of the State of

To all to whom these presents shall come - Greeting
Know ye that whereas Samuel Lapsley late of
the County of LaSalle and State of Illinois, died
on or about the nineteenth day of June AD 1839 as
it is said after having duly made and published

his last Will and Testament a Copy of which is
hereto annexed - leaving at the time of his death
property in this State which may be lost, destroyed or
diminished in value if speedy care be not taken
of the same and inasmuch as it appears that John
Fenghanden has been appointed Executor in & by said
last Will and 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 Fenghanden as such Executor to ^{collect and}
secure all and singular the goods and ^{rights and credits} chattels which
were of the said Samuel Gapsley deceased at the
time of his decease, in whosoever hands or possession
the same may be found in this State and well and
truly to fulfil & perform all such duties as may be
enjoined upon him by the said Will so far as there
shall be property, and the Law charge him - and in
general to do and perform all other acts which now
are or hereafter may be required of him by law.

Witness

John V. A. Hoar Probate Justice of the Peace
of the said County of Latah at his
Office in Ottawa this sixth day of September
in the year of our Lord 1839

John V. A. Hoar Probate Justice of the Peace L.S.

All of which we have caused by True Testers
to be exemplified and the seal of our County Court
of Latah 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 AD 1853
S. W. Raymond Clerk

Copy of Deed from John Farghandu Executor of
Samuel Lapsley deceased to John Swanson.

6"

This Indenture made the second day of
October One thousand Eight hundred and forty one
between John Farghandu Executor of the last Will
and Testament of Samuel Lapsley deceased of the County
of LaSalle and John Swanson and Mary Swanson
late of the County of Stephenson of the second part
Witnesseth that the said parties of the first part in
consideration of the sum of Fifteen Hundred Dollars to
them 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 LaSalle and 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
and reserving therefrom that portion of said Quarter
Section laid out into Town Lots for said Samuel Lapsley
now deceased by Jas H. Rus 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 undivided half part of the East

half of the North West Quarter The fourteen (14) in
said Township thirty three (33) North Range one (1) East
of the said Third (3^d) principal Meridian with the
appurtenances and all the estate, title and interest
of the said party of the first part then heirs and
the said John Langhander as Executor as aforesaid
doth hereby covenant and agree that, at the delivery
thereof he as Executor &c is the lawful owner of the
premises above granted and seized of good and
indefeasible estate of inheritance therein clear of all
incumbrances and that he as Executor &c warrant
and defend the above granted premises in the
quiet and peaceable possession of the said parties
of the second part then heirs and assigns forever.

In Witness Whereof the said party of the first
part hath hereunto set his hand and seal the day
and year first above written.

Read and delivered in the
presence of - See 19th line from
top the words "North West" also
in 24 from top the words "or &c" is
also 27 as Executor &c intended
before signing.

John Langhander
Executor of the last
Will and Testament
of Samuel Lapeley
deceased
N Leonard

State of Illinois
Latah County

This day before me the
undersigned Harvey Leonard
a Justice of the Peace in and for said County person-
ally appeared John Langhander to me personally
known as the real person who executed the
annexed 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

A. Leonard J. P. 

Filed Oct 4 1841

As it rememered also that on the trial
of this Cause which was by the Court on the
day of January et al of said Nov Term the plaintiff
used this case on the first and second sections
of said Agreement

The Defendant then read in evidence the
rest of said Agreement and said paper marked
A & B

Said defendant then offered to read in
evidence a Certified Copy of an Order of the Probate
Court of LaSalle County in Words and figures follow-
ing to wit

September 6th 1839

John Farghander Executor
of the Last Will and Testament
of Samuel Lapsley dec^d

Application for Letters

This day came the said
John Farghander one of the Executors named in the Will
of the ^{late} 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 Fughander.

To the reading of so much thereof as pertains to the declination of the Co-Executors with John Fughander to act as Executors of Samuel Lapely dec'd, the plaintiffs objected on the ground that it did not appear that the Co-Executors Boston Ayres and William Waddingham were cited to appear before said Court nor in what way or manner they declined to act, which objection was overruled by the Court and the same was read in evidence to which decision of the Court the plaintiffs then and there excepted.

The defendant by his counsel in order to show title in said defendant offered to read in evidence said Copy of Deed marked "C" in said Agreement to the reading of which the plaintiffs objected and upon this objection the plaintiffs produced Tindren Clinesfelter a witness who being sworn stated that was son of the plaintiffs and a legatee under the Will of Samuel Lapely - Was now twenty two years of age and did not know of any personal property of the Estate of Samuel Lapely whereunto his legacy might be paid.

The above was stated without objection.

Said Witness further stated that he had never received his legacy or any part of it - that he knew Martha Clinfelt - she is his sister had lived ^{near} all the time - should have known it if she had ~~known~~ received her legacy and thinks she has not received it.

Knows Margaret Clinfelt she is his sister and for the same reason thinks she has not received her legacy - that he knew John Faghanden - that he had been a resident of this County until about A.D. 1848 and ^{that} since then he had not seen him.

To the receiving of which testimony lastly above set forth in evidence the defendant objected and the objection was sustained by the Court to which decision of the Court the plaintiffs then and there excepted.

The plaintiffs also produced Samuel W. Raymond a witness who being duly sworn stated that he was then the Clerk of the LaSalle County Court - that he had looked through all the papers and Records in his Office pertaining to & in the matter of the Estate of Samuel Lapsley dec - that there were no papers in his Office as to the citation or appearance of Burton Ayres and William Waddingham before the Probate Court of LaSalle County and of their declining the Executorship except the order of said Court aforesaid as to the granting letters Testamentary to John Faghanden as sole Executor and that he had been acquainted with John Faghanden for many years and until a few years past.

The above testimony was given without objection.

The plaintiffs then proposed to prove by said Witness that it did not appear by the

papers and Records of his Office that said Faughbender had rendered any final account to said Court of Probate or County Court of his proceedings as Executor of said Estate, nor that he had paid any of said legacies - that it did not appear that he answered a Citation issued by said Court and served upon him in A.D. 1848 - and also to prove by said Witness that said Faughbender had at about 1848 absconded or left this Section of Country for parts unknown.

The defendant objected and the objection was sustained by the Court to which decision of the Court the plaintiffs then and there excepted.

The Court decided that said Deed might be read in evidence which was done, to which decision the plaintiffs then and there excepted.

The defendant rested his case and this was all the testimony offered.

The Court having taken the matter under advisement until the Feb'y. Special Term at said Term found in favor of the defendant.

The plaintiffs by their Counsel moved for a new trial without regard to the Statutes for the following reasons.

1. The Court erred in permitting to be used in evidence said certified Copy of the said Order of the Probate Court.

2 The Court erred in not hearing the testimony of Truman Clinesfelter

3 The Court erred in not hearing the testimony of J.W. Raymons.

4 The Court erred in permitting to be read in evidence the said Copy of Deed of John Fanzhanden to John & Mary Swanson March 6th.

5 The finding of the Court was against the evidence

6 The finding of the Court was against Law.

The Court overruled said motion for a new trial - to which decision the plaintiffs then and there by their Counsel excepted and pray that this their bill of exceptions may be signed & sealed & made a part of the Records which is done

E. J. Leland 

State of Illinois
LaSalle County
I Philo Linsley Clerk of the Circuit Court in & for said County do hereby certify that the above and foregoing is a full true and complete copy of all the proceedings, orders, and Judgments of the Court in the foregoing cause as the same appear of record and in file in my office
In Testimony whereof

have herunto set my hand and
the Seal of said Court this 6th day
of May A.D. 1854
Philip H. Clerk



And now come the said plaintiffs in error by E. J. Holbrook their attorney and say that in the record & proceedings aforesaid and in the rendition of the judgment aforesaid manifest error hath intervened to their prejudice in this, to wit:

- 1 The said Circuit Court erred in admitting improper testimony offered by defendant in error
 - 2 The court erred in excluding testimony offered by said plaintiffs, and which ought have been admitted
 - 3 The said Court erred in overruling the motion of said plaintiffs for a new trial.
 - 4 The said court erred in rendering judgment upon the evidence in favor of the said defendant in error.
 - 5 The judgment was against the law & the evidence: and the court erred in rendering judgment in favor of the defendant below when by the law of the land said judgment ought to have been rendered for said plaintiffs in error.
- Wherefore &c.

E. J. Holbrook for plaintiffs

And the said defendant
in error, by Dickey & Wallace his
attorneys comes and says that
there is no error in the record of
the proceedings of said cause as
the said plaintiff in error hath
above assigned - and this he
~~prays may be~~ ^{ready to verify} tried by the
record aforesaid. Wherefore
he prays that said judgment
may be affirmed &c.

Dickey & Wallace
attys for deft
in error

26
Henry Clinfetter
& Mary Clinfetter
of
Barton Lynn

Transcript

Filed May 25. 1854.
L. Seland Clk.

Clinfetter \$6.10