No. 8820

Supreme Court of Illinois

John D. Pahlman, Executor,

---

vs.

Wm. R. Smith

United States of America }
State of Illinois. Cook County } ss.

Pleas before the Honorable the Judges of the Superior Court of Chicago within and for the County of Cook and State of Illinois at a regular term of said Superior Court of Chicago begun and holden at the Court House in the City of Chicago in said County and State on the first Monday being the third day of October in the year of our Lord one thousand eight hundred and fifty nine and of the Independence of the United States of America the eighty fourth

Present: The Hon: John D. Wilson, Chief Justice of Superior Court of Chicago.
Wm H. Higgins and Grant Goodrich
. . . . . Judges.
Carlos Haven . . Prosecuting Attorney
John Gray . . Sheriff of Cook County.

Attest.
Walter Kimball Clerk.

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Be it remembered that heretofore to wit on the third day of October in the year of our Lord one thousand eight hundred and fifty nine came John. D. Pahlman Petitioner by Rucker & Scates, their Solicitors, and filed in the Office of the Clerk of the Superior Court of Chicago, their certain Bill of Complaint. Which said Bill of Complaint is in the words and figures following, that is to say.

"State of Illinois }
Cook County. } ss.

To the Hon: the Judges of the Superior Court of Chicago in Chancery sitting:

Humbly complaining showeth unto your Honors, your Orator, John. D. Pahlman, Martha. A. Rossetter, George W. Rossetter, and Charles Decatur Rossetter, infants under the age of Twenty one years, by James Campbell their next friend, that your Oratrix Martha. A. Rossetter was the wife and is now the Widow of the late Asher Rossetter deceased. That Mary. S. Leavitt George W. and Charles Decatur Rossetter are the only children of said Asher Rossetter left by him at the time of his decease, and are now all under the age of Twenty one years, and that the said Mary. S. Leavitt was the wife of Frank. A. Leavitt at the time of the death of said Asher Rossetter.

Your Orators would further represent that on or

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about the 25th day of February 1858, said Asher Rossetter, then and for a long time previous thereto a resident of the City of Chicago departed this life, having first made and published his last Will and Testament in writing, duly executed: Which said Will was afterwards to wit, on the 9th day of March 1858, presented to, duly approved and probated before the County Court of Cook County, State of Illinois, and regularly filed and recorded in said Court as the true last Will and Testament of the said Asher Rossetter, deceased.

Your Orator would further show and state that in and by said Will the said Asher Rossetter constituted and appointed your Orator John D. Pahlman, and one John B. King, executors of his said last Will and gave and devised, after the payment of all his just debts and charges, all his Messuages, lands and tenements wheresoever situated unto your Orator John D. Pahlman and said John B. King, and their heirs and the heirs of the survivor of them, to hold the same to the use of your Orator Pahlman and said King, and the survivor of them and his heirs for and during and until the time when his youngest child, your Orator Charles Decatur Rossetter should arrive at the age of Maturity, or twenty one years of age, and that then and thenceforth your Orator Pahlman and said King should cease to exercise any further control over the same, but the title to all his said lands and tenements should then vest absolutely in his said Children: said testator Rossetter further declared

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in and by said Will that the devise aforesaid should be subject to the conditions following, to wit; that upon the arrival at age, or in case of Marrying before arriving at age, of his daughter the said Mary. S. Leavitt, then and in either case your Orator Pahlman and said King should give and set over to the said Mary, S. or in case of her Marriage, to her husband, such an amount of his Estate as your Orator Pahlman and said King should deem a third of the property real and personal left by him, said Rossiter, at the time of his death; and also, that upon the coming of age of your Orator George W. Rossiter, a like amount should be set off to him by said King and your Orator Pahlman; and upon the coming of age of your Orator Charles Decatur Rossiter as much should be set off to him as said George W. and Mary, S. had each received; and in case of the

(4)

death of any one or more of his said Children before arriving at Maturity, without leaving issue, then the portion or portions of the one, or ones, so dying, should go to the survivors or survivor, in equal proportions; but if issue were left, the issue should have the portion of his, the said Asher Rossiter's Estate to which the parent would be entitled on arriving at the age of twenty one years. The said Rossiter in and by his will further declared that the Estate devised to your Orator Pahlman and said King should be subject to the following trusts to wit, that your Orator Pahlman and said King the survivor of them should during the continuance of their

Estate, take and receive the rents and profits of the property devised to them in trust as aforesaid, and therewith make all necessary repairs and pay all taxes and other necessary charges & expences and then to pay your Oratrix Martha R. Rosseter, in lieu and in place of her right to dower One thousand dollars per annum during the term of her Natural life: Said One thousand dollars to be paid in quarterly payments; after which your Orator Pahlman and said King should in their discretion pay over the residue of said rents to your Orators and the said Mary S. the children of said Rosseter in equal proportions to use the same for their maintenance, Education & support, as said King & your Orator Pahlman, or the survivor of them, might deem proper and Expedient: Said testator Rosseter in and by his Will further declared that he did further authorize & empower his Executors, the said King and your Orator Pahlman, and the survivor of them in case his personal Estate should be insufficient to pay his just debts and incidental charges and the annuity aforesaid and to support your Orators and said Mary S. his said children to sell and convey in fee simple or for a less Estate and for such prices as said King and your Orator Pahlman might deem Expedient such parts of his Messuages, lands and tenements as might be necessary to pay said debts, annuity and to support and maintain his said children and to appropriate the proceeds thereto — Your Orators file herewith a Certified Copy of the Will of said Asher Rosseter marked Exhibit A. and make it a part of this bill and refer to it for a

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fuller and more accurate statement of the contents of said Will.

Your Orators would further state that since the probate of said Will of said Rossiter as aforesaid, your Orator John D. Pahlman has applied to the Cook County Court aforesaid and has been duly approved and qualified by said Court as Executor of the said last Will and Testament of said Asher Rossiter deceased, and that letters testamentary have been duly granted therein, by said Court to him, and that he has since been and is now acting as such Executor and that he has never renounced the right title or trusts conferred upon him by said Will, but has accepted the same and is now endeavoring faithfully to carry into Execution the said Will of said Rossiter. Your Orator Pahlman files herewith a Copy of his letters testamentary granted to him by the said County Court of Cook County as aforesaid and makes the same a part of this bill marked Exhibit (B).

(b)

Your Orators would further state that the said John R. Kuig appointed as aforesaid Co-Executor and Co Trustee with your Orator Pahlman, has never accepted the Executorship of said Will, nor the right, title, interest nor trusts conferred therein or him, but has refused the same and has never intermeddled with the Estate of said Rossiter, devised as aforesaid, and has by his writing under Seal presented to and filed in said County Court, wholly renounced said Executorship and also every interest in and control over the Estate, real and personal, which was the property of the said Asher Rossiter; which renunciation was accepted by said Court and entered

of Record - A Copy of which and the proceedings thereon in said Court is filed herewith marked Exhibit (D) and prayed to be taken as a part of this bill.

Your Orators would further represent that the said Asher Rossiter at his decease was seized and possessed of, or had interests in the following described premises and property, viz;

An equal undivided half of Lots Nos 5 and 6 in Block No 6 in Kinzies Addition to Chicago, with the buildings and improvements thereon. The said undivided half was held by said testator in fee simple, but subject to a Mortgage on the whole property to secure the sum of Sixteen thousand dollars, balance of the purchase price thereof to Thomas Dyer, and of which sum that remained unpaid on the 14th of June 1859, the sum of Ten thousand dollars principal, and Six hundred dollars interest, also of which remains unpaid, together with interest on both said principal and interest from said 14th of June 1859, and of which there was due on said 14th June 1859 Three thousand dollars on principal and Six hundred dollars interest which last two sums are now unpaid.

(7)

Also an Equitable interest in the South quarter of Block No Sixty Nine in the School Section Addition to Chicago the legal title to which was in Buckner S. Morris, subject to a trust deed on the same given by said Rossiter to Horatio G. Shumway as trustee to secure certain indebtedness of said testator amounting to some Sixteen thousand dollars and upwards. The said indebtedness not having been paid as provided for by the agreement of said Rossiter, the said premises

have been sold and conveyed by said Trustee for the sum of Thirty Thousand dollars and the said Trustee still holds the surplus Money, after paying the debt secured, interest, costs and expenses and refuses to pay it over to your Orator & Pahlman and proceedings are now pending in this Court in which your Orator Pahlman on the one side claims said surplus and on the other, others set up claims to have said surplus Money appropriated to debts for which said testator Rossiter was in his lifetime liable.

Also the West half of the North West Quarter of Section No Fourteen in Township No Forty three, North of range No Twelve East; and a part of the North East fractional quarter of same Section laid out into Lots in the Town of St Johns all being situated in the County of Lake in the State of Illinois. These lands however are claimed adversely by other parties and the Controversy respecting the right to them are now pending before the Circuit Court of said last named County.

(8)

Also an Equitable claim to or right in some three acres of Land lying South of and adjacent to the City of Chicago, being part of lands formerly owned by the late Samuel Ellis deceased. His legal title to this land is in other parties and a litigation is now pending before the Circuit Court of Cook County concerning the same

Also the legal title to Lots Nos Seventy nine and Eighty in what is called Cottage Grove Subdivision of part of the lands last above referred to. The Testator Rossiter had contracted to convey these lots to other parties and a

part of the purchase money yet remains due said testators Estate.

The said testator Rossetter also had at the time of his death sundry choses in action and unsettled claims three which your Orator Dahlman could collect have been collected and applied towards paying the Debts and other charges against the Estate of said Rossetter

The principal share of the residue of said claims and choses in action are valueless and uncollectable. The Chattel property and effects of said testator Rossetter have been duly administered and appropriated as the law directs under the sanction of the County Court aforesaid.

(9) Your Orator would further represent that at the time of the decease of said Rossetter, he, said Rossetter was largely indebted to sundry creditors and was subject to heavy claims and demands against him, secured on his real Estate. the full extent and amount of which are not yet fully made known: but so far as ascertained or believed to exist by your Orator Dahlman, the indebtedness & liability of said Rossetter over and above the sums paid by the said Horatio G. Shumway as Trustee as aforesaid, exceed the sum of Twenty thousand dollars.

Your Orators file herewith as part of this Bill marked Exhibit E. a statement of the judgments against and debts of the said Rossetter as far as known to or believed to exist by them and refer to it for a fuller statement of said indebtedness.

Your Orator Dahlman would state that he has

made his annual report to and settlement before the County Court of Cook aforesaid. That a large number of claims have been adjudged and allowed by said Court against the Estate of said Rosseter, which he as such Executor has been ordered to pay in due course of administration, and that other large claims have been filed in said Court for adjudication and allowance.

Your Orators would further state that the debt aforesaid secured by said Mortgage on lots five and six in Block six, in Kinzies Addition to Chicago, was some years ago, together with the said Mortgage given to secure the same assigned to one Alfred Smith, who is now as your Orators understand and believe, the owner of the same. That said Mortgage contains a clause empowering the Mortgagee and his assigns to sell the Mortgaged property in default of payment of any instalment. That the Estate of said Rosseter owes the one half of the Note for three thousand dollars past due as aforesaid and one half of said six hundred dollars interest, That the said Smith threatens to sell said property, for the purpose of obtaining payment of his said debt. That your Orator Dahlman has no money or means in his hands of the Estate of said Rosseter or within his control, unless it be the real Estate of said Rosseter with which to pay off the debt now due as last aforesaid stated. Nor has he any money or means outside of said real Estate with which to pay off afore the debts aforesaid allowed and to be allowed against the Estate of said Rosseter, nor has he any money or means with which to

(10)

pay your Orator Martha A. Rossiter her annuity of $1000 per year, or any part thereof, or to pay or appropriate to the Maintenance, support or Education of your Orators George W. and Charles Decatur Rossiter, nor has he ever paid the said Martha A. Rossiter anything on her said annuity, nor has he paid anything toward of your Orators, the said Children of Rossiter.

Your Orators state that the personal Estate of the said Asher Rossiter was entirely insufficient to pay the debts of said Rossiter - that the real Estate of said Rossiter has been almost entirely unproductive, the rents, issues, and profits not being sufficient to pay the taxes thereon.

(11) Your Orators would further state that the indebtedness of the Estate of said Rossiter is such and the condition of the said property is such that it will not and cannot afford revenues and profits anything like sufficient to pay the debts of said Estate, or save the incumbered property from sacrifice. Much less will said rents and profits enable your Orator Pahlman to pay the annuity to said Martha A. Rossiter, or any part thereof or anything towards the support and Education of the said Children of said Rossiter.

In this condition of the affairs of said Estate your Orator Pahlman deemed it both his right and his duty under the Will of said Rossiter to sell a portion of the real Estate belonging to said Rossiter at the time of his death and considering the condition of the property designated before as lots five and six - that it has been

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and will in all probability continue to be unproductive unless large outlays shall be made in its improvement, your Orator John D. Pahlman did on the 7th day of September 1859 enter into a Contract in writing with one William R. Smith which was signed and sealed by both said Smith and your Orator Pahlman, and which is filed herewith and made part of this Bill, Marked Exhibit. F. by which your Orator sold to said Smith the undivided half of the aforesaid lots five and six in Kinzies addition to Chicago, which was the property of said Rossiter at the time of his death and agreed to convey to said Smith by a deed with the usual Covenants of a trustee with power of sale, a good and perfect title, clear and free from all encumbrances, liens, taxes & assessments except the Mortgages liens aforesaid, and the taxes and assessments levied during the year 1859, and in consideration of the Conveyance of the title aforesaid, said Smith agreed to assume upon himself and pay the one half of the debt secured by the Mortgage aforesaid, executed to Thomas Dyer, to wit; the half due from the Estate of said Rossiter, and also to pay your Orator Pahlman Five thousand dollars in Money upon the reception of a deed conveying the title as aforesaid, or in case of dispute as to the deeds conveying the title aforesaid then upon its being decided by a Court of competent jurisdiction that the deed tendered does or will convey such title.

(12)

Your Orators aver and state that the sale set forth in said agreement is a just and proper one and

unto calculated to benefit the Estate of said Rossiter, the Creditors thereof, and your Orator, and that the price agreed to be paid is a just and fair one, and fully equal to the present value of the property sold;

Your Orator and Oratrix would further state that soon after the making of the said agreement in writing with said William R. Smith your Orator caused to be prepared and duly executed by himself and on the 12th day of September 1859 handed to said Smith personally in Chicago a deed which by its terms conveyed to the said Smith the premises mentioned and described in the said agreement with him, with usual Covenants of a trustee, with power of Sale, and by its terms conveyed to said Smith the interest sold as aforesaid, and that said deed would have conveyed to said Smith, if it had been accepted by him a good and perfect title to said property so bought by him as aforesaid, clear and free from all incumbrances, liens, taxes and assessments except the taxes and assessments levied during the year 1859 and was in all respects a full compliance with your Orator Pahlman's obligation imposed upon him by his Contract aforesaid with said Smith, and your Orator Pahlman did then and there request said Smith to accept said deed and pay your Orator Pahlman the said sum of Five thousand dollars ($5000) but the said Smith refused to accept said deed or pay said money and still refuses to do either, alleging that the deed so tendered him as aforesaid, does not, and will not convey to him, a good and

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perfect title to the property bought by him as aforesaid

Your Orators file herewith the said Deed so made and tendered to said Smith as aforesaid marked Exhibit (X) and make the same a part of this bill.

In consideration of the premises your Orators & Oratrix pray that your Honors, will compel the said William R. Smith to accept the said and filed herewith Marked Exhibit (X) or if it shall be deemed defective, such other deed as your Honors will adjudge will convey the title agreed to be conveyed as aforesaid by your Orator Pahlman to said Smith and that your Honors will compel said Smith to pay to your Orators Pahlman the said Five thousand dollars as by his said Covenant he agreed to do.

Your Orators make said William R. Smith party Defendant to this bill and call upon him to answer the same as fully and specifically as if Each charge and allegation therein were repeated by way of Special interrogatory, your Orators hereby waiving the oath to any answer made by him.

(14)

Your Orators pray for the Writ of Summons to be issued under the seal of this Court, directed to the Sheriff of Cook County, commanding him to summon the said Smith to appear and answer hereto.

Your Orators pray that your Honors will grant them such Orders of relief and decree as the nature of their case may permit or require, and as they are in Equity and good conscience entitled to, and as in duty bound

will Ever pray &c

(signed) John D. Pahlman, Executor.

Martha Rossiter

by Dra Walker

George H. Rossiter

Charles D. Rossiter

By James Campbell

their Guardian

(15)

(Copy of Will)

"Know all Men by these Presents That I Asher Rossiter of the City of Chicago, County of Cook & State of Illinois being in delicate health but of sound and disposing mind and memory and being desirous to settle my worldly affairs while I have strength and capacity do to do

Do make and publish this my last Will and Testament hereby revoking and making Void all former Wills by me at any time heretofore made,

And I do hereby constitute and appoint John D. Pahlman and John B. King all of Chicago County and State aforesaid and the survivor of them Executors & Executor of this my last Will and Testament—

And after the payment of all my just debts and charges, I dispose of my Estate as follows.

I give and devise all my Messuages lands and tenements wheresoever situated unto the said John Pahlman and John B. King and their heirs and the heirs of the survivor of them Johann and to hold the same to the uses following to wit; to the use of them the said John Pahlman & John King Executors and the survivor of them and his heirs for and during and until the time when my youngest child Charles Decatur Rossiter shall arrive at the age of Maturity or twenty one years of age, and that then and from thenceforth the said King & Pahlman shall cease to exercise any further control over the same; but the title to all my said lands and tenements shall then vest absolutely in my said children subject however

Exhibit A.

(16)

to the following conditions that the said Pahlman & King shall upon my daughter Mary S. coming of age or in case she should marry before arriving at the age of maturity then and in either case they the said Executors shall give and set over to her or to her husband in case she marries from and out of my Estate such an amount as they the said King & Pahlman shall deem a third of the property left by me at my decease both real and personal.

As also upon my Son George H. Rossiter coming of age then said King & Pahlman shall in like manner set off to him so much of my Estate as they shall consider equivalent to one third of the whole amount left at the time of my death.

(17)

And when my youngest Son Charles Decatur Rossiter shall come of age then the said King & Pahlman shall set over to him as much as each of my other said children shall receive, and if there shall then be anything remaining after such distribution arising from the rents and profits or in any other way from my real and personal Estate it shall be divided equally between my said Children and their heirs.

And in case of the death of one or more of my said children without heirs before arriving at the age of maturity, then and in that case their portion of my Estate to which by the provisions of this Will they would be entitled either real or personal shall go to and be divided equally between survivors or survivor of them.

And if any or either of my said children die

before arriving at the age of Maturity leaving issue then such issue shall be entitled to the same proportion of my Estate as the parent of said Child or Children would be under the provisions of this Will

And the freehold which I have devised to the said King & Dahlman and the survivor of them for and during and until the Maturity of all of my said Children is upon the Especial trust following to wit, that they the said King & Dahlman and the survivor of them shall during the continuance of the said Estate take and receive the rents and profits accruing from the Messuages, land and tenements aforesaid and therewith make all Necessary repair and pay all taxes and other Necessary charges and expences in and about the same and after all such payments directed shall in their discretion pay over the residue of said rents and profits to my said Children in Equal proportion or shall use the same for the maintenance, Education and support of my said children as they the said King and Dahlman or survivor may deem proper and Expedient

(18)

Subject however to this Condition that before the payment of said residue to my said Children, they the said King and Dahlman shall pay to my wife Martha A. Rossiter instead and in the place of her right to dower the annuity or yearly rent of One thousand dollars Each and every year during the term of her Natural life. And the said annuity or yearly rent shall be paid to her my said wife in four Equal quarterly payments

per year on the first day of January and on the first day of May and first day of September in every year, the first payment to begin and to be made on such of the said days as shall next happen after my decease And I do further authorize and Empower the said King & Pahlman my Executors and the survivor of them in case my personal Estate shall be insufficient to pay my just debts and incidental charges, as also the annuity for my said wife and support for my said children to sell and convey in fee simple or for a less Estate, and for such prices as they may judge expedient such parts of my Messuages lands and tenements aforesaid as may be necessary for that purpose and the proceeds of such sale to appropriate thereto, and further the receipts in writing of my said children or wife to the said Pahlman & King for any sum or sums of money paid them by virtue of this Will and Testament shall be a good and sufficient discharge unto them and every one of them therefor.

(19)

In testimony whereof I have hereunto set my hand and seal this 7th day of August A.D. 1854.

Asher Rofelter.

Signed sealed and delivered as his last Will and Testament by the testator in our presence who at his request and in his presence have hereto set our hands as Witnesses

W. W. Leavitt

S. G. Leavitt

Witness.

Exhibit "B"

"State of Illinois }
Cook County . } ss.

The People of the State of Illinois, to all to whom these Presents shall come, Greeting.

Know ye, That whereas Asher Rossiter late of the County of Cook and State of Illinois died on or about the Twenty fifth day of February A. D. 1858 as it is said, after having duly made and published his last Will and Testament, a Copy whereof is hereunto 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 D. Pahlman has been appointed Executor in and by the 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 D. Pahlman as such Executor to collect and secure all and singular the goods and chattels rights and credits which were of the said Asher Rossiter at the time of his decease in whose ever hands or possession the same may be found in this State; and well and truly to perform and fulfil all such duties as may be enjoined upon him by the said Will, so far as there shall be

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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 Charles B. Farwell, Clerk of the County Court of said County; and the Seal thereof at the City of Chicago in said County this Eighth day of March A.D. 1858.

L. S.

C. B. Farwell

Clerk of the County Court.

"State of Illinois }
County of Cook } ss.

I, Charles B. Farwell, Clerk of the County Court of Cook County Do hereby certify that the foregoing is a true and correct Copy of the last Will and Testament of Asher Rossetter deceased and of Letters Testamentary thereon issued from said Court to John D. Pahlman as Executor thereof; that said Will has been proven and admitted to record in said Court, and is now on file in my Office, and that said Letters Testamentary are still in force and unrevoked.

(21)

In testimony whereof I have hereunto set my hand and the Seal of said Court at Chicago in said County this Seventeenth day of June A. D. 1859.

Seal

C. B. Farwell

Clerk.

Exhibit "D"

"State of Illinois }
County of Cook } ss.

County Court of Cook County - April term
April 10th 1858. Court met pursuant to adjournment

Present Hon: William Y. Barron ... Judge
John L. Wilson .... Sheriff
Charles B. Farwell .... Clerk

Rossetter Asher }
Estate of } Filing of declination as Executor.

This day comes into Court John B. Kuig one of the Executors named in the last Will and Testament of Asher Rossetter deceased, and presents to the Court his declination of such office in writing which is Ordered to be placed on file.

(22)

"The undersigned John B. Kuig hereby wholly refuses to accept the Executorship of the last Will and Testament of Asher Rossetter deceased, & further states that he has not intermeddled with the Effects of the testator, since his decease, nor in any manner acted as Executor of said Will, and disclaims all interest in and control of the real Estate of said deceased.

Chicago March 30 1858.

John B. Kuig (L. S.)"

"The foregoing is a true and correct Copy

from the Records and files of the County Court of Cook County.

Witness Charles B. Farwell, Clerk of said Court and the Seal thereof at Chicago in said County, July 8th 1859.

Seal

C. B. Farwell Clerk "

"Abstract

of Executors Account, and showing of Estate of Asher Roesiter deceased in probate Court."

Executors account shows

Receipts

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To	Chattels property per appraisal	639 " 77
"	Sales of Real property	308 " 75
"	" Sale House Furniture	2000 " 00
"	Rents Collected	1663 " 93
"	Demands "	1549 " 21
"	Loans Negotiated &c	10293 " 11
		$16354 " 77

Payments &c

By	property selected by Widow	639 " 77
"	Bal: paid Widows Award	301 " 48
"	interest &c on Mortgages &c	2880 " 00
"	Exps allowed by Court	1310 " 33
"	Coms " "	981 " 28
"	Loans made	8680 " 20
		$14793 " 06

"Due on loans made 2215 " 00

" " on claims allowed 4081 " 48

Claims pending in Court 3703 " 40"

"State of Illinois }
County of Cook } ss.

I do hereby Certify the above to be a true Abstract from the records and papers on file in my office.
In testimony whereof I have hereto set my Name and Seal of the County Court of Cook County this sixth day of July 1859.

Seal

C B. Farwell Clerk of
County Court of Cook County"

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Exhibit "E"

Liens and Judgments against Estate.

1853
June 14. Mortgage executed by Rositter & Graves to Thomas Dyer for securing Notes . . . $ 16000-00
on which remains due $7000-
with accruing interest.

Mortgage assigned to Alfred Smith

Judgments

In Circuit Court Cook County.

1857
Nov. 19 John F. Miller Etal vs Asher Rositter Et als } Damages $ 1027,83 Costs

1857

Nov 19 N. W. Magic Surv't of
vs
Asher Rossiter Et als } Damages $1210.66 & Costs

" 24 John B. King
vs
Asher Rossiter Et als } Damages $1210.00 & Costs.

In Court of Common Pleas

" 6 Asher High Jr
vs
Asher Rossiter Et als } Dams. $1000.83 & Costs
Jany 11th 1858 Rossiter made party.

" 5 F. M. Kirwin
vs
Asher Rossiter Et als } Damages $1206.00 & Costs.

(25)

Edwin Blackman
1858 Assn of Asher High Jr. } Damages $1018.00
Jany 11. vs & Costs
Asher Rossiter Et als } $6673.37

Exhibit "F"

Article of Agreement made and entered into this the 4th day of September 1859 Between John. D. Dahlman of the first part and William R. Smith of the second part both of the City of Chicago, County of Cook and State of Illinois Witnesseth that the party of the first part being as he believes the sole Executor and Trustee of and under the last Will and Testament of Asher Rossiter deceased Which

said Will of said Rossiter has been duly proven in the County Court of Cook County Illinois, and is now of record in the proper Office for recording Wills in said County, and having authority as he believes under and by virtue of said Will in the present circumstances and condition of the Estate of said Rossiter to sell and convey any part or all of the real Estate of said Rossiter, doth hereby sell to the party of the second part, an undivided half of Lots five and six in Block ~~Six~~ in Kinzies addition to Chicago together with all and singular the improvements and buildings thereon and the appurtenances thereunto belonging. Said lots five and six are situated between Michigan & Kinzie Streets and are bounded on the West by Rush Streets and lie on the North side of Chicago river in the City of Chicago and are the lots on which the building known as the Lake House now stands.

(26)

The property hereby sold the party of the first part claims and represents as the property of said Asher Rossiter deceased at the time of his death — the party of the second part being understood to be the owner of the other half deriving title from another source

The party of the first part hereby agrees to convey by a good and proper Deed without Covenant of warranty binding himself personally, but by the Ordinary deed of a trustee, with power of sale and its Covenants of warranty to the party of the second part a good perfect title to the one half aforesaid, clear and free from all rights, titles or titles, incumbrances or incumbrances, lien or liens, apessment

or assessments, tax or taxes, of all and every Nature whatever except as hereinafter stated & specified.

The party of the second part hereby agrees in consideration of the conveyance to him of the title herein specified to pay the party of the first part the sum of Five thousand dollars ($5000.) upon the execution and delivery to him of a deed conveying the title herein specified to the property specified or in case of dispute between the parties hereto as to the deed conveying the title herein specified then upon it being adjudged by a Court of competent jurisdiction that the deed offered by the party of the first part to the party of the second part is sufficient and does or will convey the title herein sold and agreed to be conveyed

(27) And whereas there is a Mortgage dated June 14th 1853 on the whole of the property aforesaid given to secure six Notes of said Heber Rossiter dec'd and Shelom Graves of even date with said Mortgage executed to Thomas Dyer, five of which Notes were for Three thousand dollars each payable respectively in two, four, six, eight and ten years after date, the sixth Note for One thousand dollars payable Eleven years from date with interest at six per cent payable annually on the whole sum: Which said Mortgage was executed to Thomas Dyer by said Rossiter & Graves and is of record in the Recorders Office of Cook County Illinois, in Book 15 of Mortgages page 130. and which said Mortgage as appears of record in said Recorders Office has been assigned to one Alfred Smith who is understood to be the owner of the same and the

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debt secured thereby.

And whereas there is now standing unpaid only three thousand dollars of the principal debt secured by said Mortgage, together with six hundred dollars of interest due on the 14th June 1859, and the accruing interest since the 14th June 1859 on the whole sum one of said three thousand dollar Notes being due on the 14th of June 1859 and the remaining unpaid.

Now it is understood and agreed that the party of the second part shall pay one half of the Notes and debt secured by said Mortgage together with interest aforesaid and assume upon himself the debt and Mortgage aforesaid to the extent of one half thereof as part of the consideration of his said purchase said one half being the portion of said Mortgage debt which the said Asher Rossiter deceased was bound to pay.

(28)

The deed hereon agreed to be made is to be taken subject to the Mortgage aforesaid.

It is further understood and agreed that the party of the second part is to take said property subject to the taxes and assessments, assessed for the year 1859, but that the party of the first part is to pay off and discharge all taxes and assessments thereon assessed for any previous year or years.

In witness whereof the parties aforesaid hereunto set their names and affix their seals the day and date first above written. A. D. Dahlman (Seal)

(Signed) William R. Smith (Seal)

Exhibit "H"

This Indenture made this Tenth day of September in the Year of our Lord One Thousand eight hundred and fifty nine Between John, D. Pahlman as sole acting Executor of and Trustee under the last Will and Testament of Asher Rossetter late of the City of Chicago, County of Cook and State of Illinois deceased, party of the first part and William R. Smith of the City aforesaid, party of the second part, Witnesseth,

That whereas the said Asher Rossetter departed this life lately, to wit; On or about the Twenty fifth day of February in the year of our Lord One Thousand Eight hundred and fifty eight, having made and left his last Will and Testament duly attested, and which was afterwards to wit on the Third day of March in the year last aforesaid duly proved and admitted to Probate in and before the County Court of Cook aforesaid and regularly recorded therein as provided by law, and which said Will is in substance and to the effect following, viz:

(29)

"Know all Men by these Presents that I Asher Rossetter of the City of Chicago, County of Cook, and State of Illinois, being in delicate health, but of sound and disposing mind & memory; & being desirous to settle my worldly affairs while I have strength and capacity so to do

Do make and publish this my last Will and Testament; hereby revoking and making void all former Wills and Testaments by me at any time heretofore made

[8820-57]

And I do hereby constitute and appoint John D. Pahlman and John B. King, all of Chicago, County and State aforesaid, and the survivor of them, Executors & Executor of this my last Will and Testament, and after the payment of my just debts and charges, I dispose of my Estate as follows.

I give and devise all my Messuages, lands, and tenements wheresoever situated unto the said John D. Pahlman & John B. King and their heirs, and the heirs of the survivor of them To have and to hold the same to the uses following to wit, to the use of them the said John. D. Pahlman and John. B. King Executors and the survivor of them, and his heirs for and during and until the time when my youngest Child Charles Decatur Rossetter shall arrive at the age of maturity, or twenty one years of age, and that then and from

(30) thenceforth the said King & Pahlman shall cease to Exercise any further control over the same; but the title to all my said lands and tenements shall then vest absolutely in my said Children: Subject however to the following conditions; That the said Pahlman and King shall upon my daughter Mary S. coming of age, or in case she should Marry before arriving at the age of maturity, then and in either case, they the said Executors shall give and set over to her, or to her husband in case she marries, from and out of my Estate, such an amount as they the said King and Pahlman shall deem a third of the property left by me at my decease, both real and personal.

It also upon my son George H. Rossetter, coming of

age, then said King and Pahlman shall in like manner set off to him so much of my Estate as they shall consider equivalent to one third of the whole amount left at the time of my death.

And when my youngest son Charles Decatur Rossiter, shall come of age, then the said Pahlman & King shall set over to him as much as each of my other said Children shall have received; and if there shall be anything remaining after such distribution, arising from the rents and profits, or in any other way from my real and personal Estate it shall be divided equally between my said children and their heirs. And in case of the death of one or more of my said children without heirs, before arriving at the age of Maturity, then and in that case their portion of my Estate to which by the provisions of this will they would be entitled either real and personal shall go to and be equally divided between survivors or survivor of them. And if any or either of my said Children die before arriving at the age of maturity having issue, then such issue shall be entitled to the same portion of my Estate, as the Parent of such Child or Children would be under the provisions of this Will.

(31)

And the freehold which I have devised to said King and Pahlman and the survivor of them for and during and until the Maturity of all my said Children is upon the especial trust following, to wit:- That they the said King & Pahlman and survivor of them shall during the continuance of said Estate, take and receive the rents and profits accruing from the Messuages, lands and tenements aforesaid, & therewith

[8820-14]

age, then said King and Pahlman shall in like manner set off to him so much of my Estate as they shall consider equivalent to one third of the whole amount left at the time of my death.

And when my youngest son Charles Decatur Rossiter, shall come of age, then the said Pahlman & King shall set over to him as much as each of my other said Children shall have received; and if there shall be anything remaining after such distribution, arising from the rents and profits, or in any other way from my real and personal Estate it shall be divided equally between my said children and their heirs. And in case of the death of one or more of my said children without heirs, before arriving at the age of Maturity, then and in that case their portion of my Estate to which by the provisions of this will they would be entitled either real and personal shall go to and be Equally divided between survivors or survivor of them. And if any or either of my said Children die before arriving at the age of maturity having issue, then such issue shall be entitled to the same portion of my Estate, as the parent of such Child or children would be under the provisions of this Will.

(3)

And the freehold which I have devised to said King and Pahlman and the survivor of them for and during and until the Maturity of all my said Children, is upon the especial trust following, to wit:- That they the said King & Pahlman and survivor of them shall during the continuance of said Estate, take and receive the rents and profits accruing from the Messuages, lands and tenements aforesaid, & therewith

[8820-16]

make all necessary repairs, and pay all taxes and other necessary charges and expenses in and about the same And after all such payments deducted shall in their discretion pay over the residue of said rents and profits to my said Children in equal proportions, or shall use the same for the maintenance, Education and support of my said children as they, the said King and Pahlman or survivor may deem proper and Expedient.

Subject however to this condition that before the payment of said residue to my said Children, that the said King and Pahlman shall pay to my wife Martha A. Rossetter instead and in the place of her right to Dower, the annuity or yearly rent of One thousand dollars each and every year during the term of her Natural life; and the said Annuity or yearly rent shall be paid to her, my said wife, in four equal quarterly payments per years on the first day of January, and on the first day of May and first day of September in every year, the first payment to begin and to be made on each of the said days as shall next happen after my decease,

(32)

And I do further authorize and empower the said King and Pahlman my Executors, and the survivor of them, in case my personal Estate shall be insufficient to pay my just debts and incidental charges, as also the annuity for my said wife, and support for my said children, to sell & convey in fee simple or for a less Estate, and for such prices as they may deem expedient, such parts of my messuages lands and tenements aforesaid as may be necessary for that

purpose; and the proceeds of such Sale to appropriate thereto. And further, the receipts in writing of my said Children or wife to the said Pahlman and King, for any sums or sum of money paid them by virtue of this Will and Testament shall be a good and sufficient discharge unto them and every one of them, therefor.

In testimony whereof I have hereunto set my hand and seal this 4th day of August A.D. 1857.

(Signed) Asher Rossetter"

Signed sealed and delivered as his last Will and Testament by the testator in our presence, who at his request and in his presence have hereto set our hands as witness.

(Signed) W. H. Leavitt

S. G. Leavitt

Witness"

(33)

And whereas the said John. D. Pahlman did accept the trusts imposed upon him by the said Will of said Rossetter and undertook to execute said Will in full and is now acting as said Trustee having never renounced and afterwards to wit; on the Eighth day of March in the year of our Lord one thousand eight hundred and fifty eight the said John D Pahlman one of the Executors and Trustees named in the foregoing will, having duly probated the said Will as aforementioned, filed in the said County Court his Bond as such Executor, took and subscribed the oath of office required by law, became fully qualified as Executor, and received from the said Court proper Letters Testamentary fully authorizing him to act

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as such Executor; Which said appointment and office the said John. D. Dahlman has ever since continued to hold fulfil and perform as required by law and whose Letters aforesaid still remain in full force and unrevoked, and whose powers and authority under and by virtue of said Will and Letters Testamentary are yet complete and unreclaimed.

And Whereas afterwards to wit on the tenth day of April in the year last aforesaid, the said John B. King by his declination in writing under seal filed in and recognized by said County Court, did wholly refuse and renounce the appointment and office of Executor, as named given and conferred by said Will; and did moreover disclaim and renounce any interest in or control of the real Estate of the said Testator; by reason and virtue whereof the said John. D. Dahlman became and still continues to be the sole acting and qualified Executor of said Will, and the solely authorized agent or trustee to execute perform and discharge the powers, duties, trusts and uses created, enjoined and directed in and under the said last Will and Testament of Asher Rossetter deceased.

(34)

And Whereas the said Asher Rossetter at the time of his death was seized and possessed of certain real and personal Estate of which the following was a part and parcel

The equal undivided half of lots Nos Five (5) and six (6) in Block No six (6) in Kinzies Addition to Chicago with the buildings improvements and appurtenances thereon and thereunto belonging, situate and being in the City

of Chicago aforesaid. The title to said premises being in said testator by and through a Conveyance in fee from Thomas Dyer and Wife; but subject to a Mortgage to secure the sum of Sixteen thousand dollars balance of the purchase money aforesaid or price agreed to be paid by said Testator and Sheldon Graves, then owner of the other undivided half or interest in said premises, payable in instalments, and of which there remains unpaid the sum of Ten thousand dollars of principal debt, and of which there is now past due the sum of Three thousand six hundred dollars for instalment and interest, on whole sum from the fourteenth day of June

(35) A. D. one thousand eight hundred and fifty eight.

And whereas the said John, D. Dahlman as Executor as aforesaid has made his annual report to, and settlement with the County Court aforesaid, Whereby it is shown and appears that the personal Estate of said Testator, so far as available, has been absorbed, and that there are no funds or effects outside of Real Estate to apply to or pay off the debts of said deceased, and whereas it has become necessary in order to pay the debts of said decedent to sell the property hereinafter as bargained and sold to the party of the second part.

Therefore pursuant to the powers and discretion of in the said party of the first part, vested and given by the Will of the said Asher Rossiter as aforesaid, he the said party of the first part Hath bargained and sold, and in consideration that the said party of the second part, hath agreed to pay one half the Notes and debt secured by to

Mortgage, referred to in the description of Lots five (5) and six (6) in Block six (6) in Kinzie's Addition to Chicago, above described, together with the interest aforesaid, and the taxes and assessments assessed for the present year on the said premises, and also for the further sum of Five thousand dollars, lawful money to him in hand paid by the said William R. Smith, party of the second part, the receipt whereof is hereby admitted, and the amount acknowledged to be a fair price for the same Doth hereby bargain and sell, grant, convey and confirm unto the said party of the second part, all and singular the following described lots, lands and real Estate, the same being a part of the property devised by the said Will of the said Asher Ropetter and designated and described as follows to wit:-

(36)

An equal undivided half of lots Numbers Five (5) and Six (6) in Block Number six (6) in Kinzie's Addition to Chicago, together with all and singular the the improvements and buildings thereon, and the appurtenances thereunto belonging, said lots five (5) and six (6) being situated between Michigan and Kinzie Streets, and are bounded on the West by Rush Street and lie on the North side of Chicago River, and are the lots on which the building known as the "Lake House" now stands.

To have and To hold the said above bargained and demised premises unto the said party of the second part his heirs and assigns forever.

And the said John. D. Fahlman as Executor and Trustee of and under the last Will and Testament

of the said Asher Rossetter deceased, and in his aforesaid, doth hereby covenant and agree to and with the said party of the second part, his heirs and assigns, that the said Asher Rossetter died seized and possessed of the above granted premises as an estate of inheritance in the law in fee simple - that the said demised premises are free and clear of all rights, title or titles adverse to or not consistent with this sale and conveyance hereby made and are free and clear of and from all incumbrances or incumbrance, lien or liens, assessment or assessments, tax or taxes, of all and every nature whatsoever; and so far as he the said Executor and Trustee, as such may be authorized or empowered by law, the above bargained premises in the peaceable and quiet possession of the said party of the second part, his heirs and assigns, shall and will warrant and forever defend.

(37)

In testimony whereof the said party of the first part has hereunto set his hand and seal this day and year first above written."

"(signed) John, D. Pahlman (Seal)"
Executor."

"State of Illinois }
Cook County } ss
City of Chicago }

I Philip. A. Hoyne a Notary Public in and for the City of Chicago in the County and State aforesaid Do hereby Certify That John. D. Pahlman personaley Known to me as the same person whose name

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is subscribed to the annexed instrument of writing, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this Twenty ninth day of September A. D. 1859.

Philip A. Hoyne
Notary Public."

And thereafter to wit on the fourth day of October in the year of our Lord one thousand eight hundred and fifty nine, came the said Defendant and filed in the Office of the Clerk of said Court, his Demurrer to said Complainants said Bill of Complaint which said Demurrer is in the words and figures following, to wit:

(38)

"Superior Court of Chicago
October Term A.D. 1859.

State of Illinois }
Cook County } ss.

The Demurrer of William R. Smith appearing in person, defendant, to the Bill of Complaint of John D. Fahlman, Martha A. Rossiter, George W. Rossiter and Charles Decatur Rossiter infants under Twenty one years by James Campbell their next friend Complainants.

This Defendant by protestation, not confessing any or all of the matters and things in the said Complainants Bill to be true in such manner and form as the same are therein set forth and alleged does demur thereto, and for cause of demurrer shews that the said Complainants have not in and by their said Bill made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against this Defendant Wherefore this Defendant demands the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to the said Bill or any of the matters and things therein contained and prays to be hence dismissed with his reasonable costs in this behalf expended

William R. Smith

Pro Se."

(39)

"Sonder in Demurrer

Rucker & Yeates, for Compl't."

And afterwards to wit also on the said fourth day of October (being one of the days of the said October Term of said Court) in the year of our Lord one thousand eight hundred and fifty nine, the following proceedings were had in said cause and entered of record in said Court to wit

John D. Pullman, Martha A Rossetter, George W. Rossetter and Charles Decatur Rossetter infants by James Campbell their Next friend . . . . . (C)

In Chancery

Bill.

vs

William R. Smith . . (D)

This day comes said Complainants by Rucker & Scates their Solicitors and said Defendant in his own proper person also comes and Counsel being heard on the Demurrer herein filed to Complainants Bill of Complaint in this cause and due deliberation being thereupon had and the premises fully understood it appears to the Court that Defendants said Demurrer is Sufficient to bar said Complainants from having and Maintaining their action against said Defendant, the Demurrer to Complainants Bill is therefore sustained and the Bill is dismissed.

(40)

Therefore it is considered said Defendant do have and recover of said Complainants his Costs and Charges in this behalf about his defence Expended and have no Execution therefor.

And thereupon said Complainants enter their Exceptions and pray an Appeal herein to the Supreme Court held at Mount Vernon in the first Grand Division of the State of Illinois, which with consent of said defendant, as per Stipulation on file is allowed, on Condition that Complainants file herein within Ten days, their Appeal Bond in the sum of Five hundred dollars with W. L. Rucker as Security.

And also on the said fourth day of October in the year of our Lord one thousand eight hundred and fifty nine there was filed in the Office of the Clerk of said Court, a certain stipulation in said cause; Which said Stipulation is in the words and figures following, that is to say.

State of Illinois } Set
Cook County . . } Of the October Term of the Superior Court of Chicago A.D. 1859.

John D. Pahlman, Executor of Rossiter deceased . . . . } Bill for Specific Performance.
vs
William R. Smith . . . . }

(41)

It is agreed between the parties that this cause may be taken to the Supreme Court of the State of Illinois at its November Term A.D. 1859 at Mount Vernon in the First Grand Division by Appeal or Writ of Error and defendant agrees to enter his appearance at said term and submit the cause for argument at said term, without service of process upon him, and that this stipulation shall be filed and become a part of the record in this cause.

Chicago, October 4th 1859.

Rucker & Scates
Solicitors for Complainants

William R. Smith
Defendant in proper person.

And thereafter to wit on the twelfth day of October in the year of our Lord one thousand eight hundred and fifty nine the said Complainants filed in the Office of the Clerk of said Court their Appeal Bond in the words and figures following, to wit:-

"Know all Men by these Presents That we John D. Pahlman Executor of the last Will of Asher Rossetter deceased as principal and Henry L. Rucker as security are held and bound unto William R. Smith in the penal sum of Five hundred dollars, and for the payment whereof we bind ourselves our heirs & firmly by these presents

In witness our hands and seals this twelfth day of October 1859.

The condition of this obligation is as

(42) follows;

Whereas the said Smith at the October Term A.D. 1859 of the Superior Court of Chicago, by the adjudication of said Court procured a Judgment against the said Pahlman as Executor, and others on and under a decree for the dismissal of said Pahlman and others Bill of Complaint, and for Costs of said suit, from which said Decree and order the said Pahlman has prayed an Appeal to the Supreme Court of the State of Illinois

Now if the said Pahlman as Executor aforesaid shall prosecute his said Appeal with Effect and shall pay in due course of Administration of the Estate of said deceased whatever costs and damages said Smith may

recover by or through said Appeal then the above Obligation shall be and become void, otherwise to remain in full force and Effect.

(signed) John. D. Dahlman } (Seal)
Executors
H. L. Rucker (Seal)

State of Illinois }
Cook County . . } ss.

I Walter Kimball, Clerk of the Superior Court of Chicago, within and for the County of Cook and State aforesaid Do hereby Certify the above and foregoing to be a full true and correct Transcript of all Papers now on file in my Office, together with the Order and Decree Entered of record in said Court, in a Certain Suit therein, wherein John. D. Dahlman and others were Complainants and William R. Smith was defendant.

(43)

In testimony whereof I the said Walter Kimball have hereunto set my hand and affixed the Seal of said Court at Chicago in said County the Eighteenth day of October A. D 1859.

Walter Kimball Clerk

[8826-22]

State of Illinois Second Grand Division

And now comes the said John D. Pahlman & others Plaintiffs in Error by Scates & Rucker their Counsel & says- that in the record & proceedings, and in the rendition of a decree in this cause in the Court below there is manifest error in this to wit

First That the Circuit Court sustained the demurrer of the defendant to the plaintiffs Bill of complaint in this behalf.

Second The Circuit Court rendered a judgment for the defendant, and dismissed the said plaintiffs bill

(44)

Third the Circuit Court rendered a decree for the defendant & against the plaintiffs - Whereas by the laws of the land - judgment should have been rendered for the plaintiffs

Wherefore for these & other errors apparent on the record - he prays that the judgment may be reversed, annulled and for nothing esteemed - and that he may be restored to all his rights lost thereby &c. Scates & Rucker for Plff in Error

State of Illinois. ~~First~~
Second Grand Division

John L Pahlman & others
vs
William R Smith

And the said William R Smith in his own proper person comes & says that there is no error in the proceedings aforesaid or in giving the judgt aforesaid and he prays this court to examine the same and that the proceedings and judgt aforesaid may be affirmed.

William R Smith

It is stipulated and agreed that this cause be Taken to the Supreme Court in the Second Grand Division to be held at Springfield in January 1860. ~~and that~~ the foregoing Record Assignment of Errors & joinder be filed - and the cause be submitted to the Court upon the printed Abstracts & briefs of Counsel in Error the Defendant hereby enters his appearance & submits this cause

Goes under our hands

[88-30-23]

at Chicago This 15th
day of December 1859.

Scates & Walker of
Counsel for Plffs in
Error.
W R Smith bro &c.

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State of Illinois } 48
Cook County. }

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John D. Pahlman Exr
et als

vs

William R. Smith

Record.

8820

Rec'd Jan 3/60
Wm H Turner
Clk

21
80

Filed Nov. 16. 1859.
N. Johnston Clk
by
Paid — $5.00

$5.50.

Springfield Jan 3 1849

Supreem Court of Ill

To J Craddock Jr

1848

Dec 23 To making 3 Keys for desks $3 00

[8820-35]

Supreme Court of Illinois.

FIRST GRAND DIVISION.

MT. VERNON, NOVEMBER TERM, 1859.

JOHN D. PAHLMAN, Executor, &c., et. al.
vs.
WILLIAM R. SMITH.
} ERROR TO COOK.

POINTS FOR PLAINTIFF IN ERROR.

SCATES & RUCKER,
FOR PLAINTIFF IN ERROR.

Supreme Court of Illinois.

FIRST GRAND DIVISION.

MT. VERNON, NOVEMBER TERM, 1859.

JOHN D. PAHLMAN, Executor, &c., et. al.
vs.
WILLIAM R. SMITH.
} ERROR TO COOK.

ABSTRACT.

Record p. 3.

Bill Charges—That Asher Rossetter, a resident of Chicago, departed this life about the 25th of February, 1858, having made his will, and which was duly proven and recorded in Cook county, on the 2nd of March, 1858:

That plaintiff was appointed, with one John B. King, executors.

That said Rossetter devised all his lands, &c., to his executors and to their heirs—the survivors of them, after the payment of all his debts, to have and to hold the same to the use of the executors, for and during

and until the time the youngest child of testator, Charles D. Rossetter, arrives at maturity, and that executors should thenceforth cease to exercise any further control over said premises, but the title to all his lands should then vest absolutely in his testator's children:

4

That the devise aforesaid was made subject to the condition following, viz: That upon the arrival at age, or in case of marriage of his daughter before she arrives at age, that then and in either case said executors should give and set over to said daughter or her husband, such an amount of his estate as said executors should deem a third of the property, real and personal, left by testator, at his death, that also upon the oldest son coming of age, a like amount should be set off to him, by the executors, and upon the youngest son coming of age, as much should also be set off to him as the other children had received.

That in case of the death of either of said children during minority, leaving no issue, then his or her portion should be equally divided between the survivor or survivors; but in case issue was left, then the portion should go to them.

5

Testator further provided by said devise that the devise to the executors should be subject to the further trusts; that said executors, and the survivor of them, should, during the continuance of their estate, receive the rents and profits of the real estate devised to them, and out of these rents, &c., to pay for repairs, taxes, and necessary charges, and expenses; and then to pay the widow of testator, in lieu of dower, one thousand dollars per annum, during her natural life, in quarterly instalments; and the balance of said rents to pay over in their discretion, to the children for their maintainance, education and support, as said executors, or the survivors might deem expedient.

That in case the personal estate should prove insufficient to pay the debts, incidental charges, and the said annuity to the widow, and to support the said children, then the executors and the survivors of them, were authorized to sell and convey in fee simple, or for a less estate, and for such prices as said executors might deem expedient, such parts of the real estate, as might be necessary to pay said debts, annuity and support and maintainance of the children, and to appropriate the proceeds thereto.

16

Said Will is made part of the bill, and is as follows:

"Know all men by these present that I, Asher Rossetter, of the city of Chicago, county of Cook, and State of Illinois, being in delicate health, but of sound and disposing mind and memory, and being desirous to settle my worldly affairs, while I have strength and capacity so to do, do make and publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made.

And I do hereby constitute and appoint John D. Pahlman, John B. King, all of Chicago, County and State aforesaid, and the survivor of them, executors and executor of this my last will and testament.

And after the payment of all my past debts and charges, I dispose of my estate as follows:

I give and devise all my messuages, lands, and tenements wheresoever situate, unto the said John Pahlman and John B. King, and their heirs, and the heirs of the survivor of them, to have and to hold the same to the uses following to wit: To the use of them the said John Pahlman and John King executors, and the survivor of them and his heirs, for and during and until the time when my youngest child, Charles Decatur Rossetter, shall arrive at the age of maturity, or twenty-one years of age, and that then and from thenceforth the said King and Pahlman shall cease to exercise any further control over the same; but the title to all my said lands and tenements, shall then vest absolutely in my said children, subject however, to the following condition:

That the said Pahlman and King shall upon my daughter, Mary S., coming of age, or in case she shall marry before arriving at the age of maturity, then and in either case, they the said executors shall give and set over to her or to her husband, in case she marries, from and out of my estate such an amount as they the said King and Pahlman shall deem a third of the property left by me at my disease, both real and personal.

As also upon my son, George W. Rossetter, coming of age, then said King and Pahlman shall in like manner set off to him so much of my estate as they shall consider equivalent to one-third of the property left at the time of my death.

And when my youngest son, Charles Decatur Rossetter shall come of

age then the said King and Pahlman shall set over to him as much sa each of my other said children shall receive, and if there shall be anything remaining after such distribution, arising from the rents and profits or in any other way from my real and personal estate, it shall be divided equally between my said children and their heirs, and in case of the death of one or more of my said children without heirs, before arriving at the age of maturity, then and in that case their portion of my estate to which, by the provisions of this will, they would be entitled, either real or personal, shall go to and be divided equally between survivors or survivor of them.

And if any or either of my said children die, before arriving at the age of maturity, leaving issue, then such issue shall be entitled to the same proportion of my estate as the parent of said child or children would be under the provisions of the will.

And the freehold which I have devised to the said King and Pahlman and the survivors for and during and until the maturity of all my said children, is upon the especial trust following to wit: That they, the said King and Pahlman, and the survivors of them shall, during the continuance of the said estate, take and receive the rents and profits accruing from the messuages, lands and tenements aforesaid, and therewith make all necessary repair, and pay all taxes, and all other necessary charges and expenses in and about the same, and after all such payments deducted, shall in their discretion, pay over the residue of said rents and profits to my said children, in equal proportion, or shall use the same for the maintenance, education, and support of my said children, as they the said King and Pahlman, or survivor, may deem proper and expedient.

Subject, however, to this condition: That before the payment of said residue, to my said children, they, the said King and Pahlman, shall pay to my wife, Martha A. Rossetter, instead, and in the place of her right to Dower, the annuity or yearly rent of One Thousand Dollars, each and every year, during the term of her natural life. And the said annuity or yearly rent shall be paid to my said wife, in four equal quarterly payments per year, on the first day of January, and on the first day of May and September in every year, the said payment to begin and to be made on such of the said days as shall next happen after my decease. And I do further authorize and empower the said King and Pahlman my executors, and the survivor of them, in case my personal estate shal

be insufficient to pay my just debts and incidental charges, as also the annuity for my said wife, and support for my said children, to sell and convey in fee simple, or for a less estate, and for such prices as they may judge expedient, such parts of my messuages, lands, and tenements aforesaid, as may be necessary for that purpose, and the proceeds of such sale to appropriate thereto; and further, the receipts in writing of my said children or wife to the said Pahlman and King, for any sum or sums of money paid them by virtue of this Will and Testament, shall be a good and sufficient discharge unto them, and every of them therefor.

6

That John D. Pahlman duly qualified as executor, and took upon himself the burden of executing the said Will of said Rossetter, and letters testamentary were duly issued to him; that he has been ever since, and now is, acting as such executor, and makes profert of his said letters testamentary.

That, his co-executor, John B. King, never accepted the executorship of said Will, nor any of the rights, interests, or trusts therein created or conveyed, but wholly refused the same, and has by his writing under seal, duly executed and filed in the County Court, wholly renounced said executorship, and all the estate and trusts created in and conferred upon him by said Will, and all control over the same, which said renunciation was accepted by the Court and entered of Record.

7

That testator was seized at his death of an undivided half of lots five and six, in block six, in Kinzie's addition to Chicago, with improvements —in fee simple—subject to a mortgage upon the whole, for the sum of $16,000, the balance of the purchase money due thereon.

8

Also, an equitable interest in the s. 1-4 of block 69, in school section addition to Chicago. The legal title to which was in Buckner S. Morris, subject to a trust deed on same, given by said Rossetter to H. G. Shumway as Trustee, to secure certain indebtedness of said testator, amounting to some $16,000 and upwards, and said indebtedness not having been paid, as provided for by said Rossetter, said premises have been sold by said Trustee, for the sum of $30,000, and said Trustee still holds the surplus money, after paying the debt secured, interest,

costs, and expenses, and refuses to pay it to Orator Pahlman, and proceedings are now pending in Court, in which Pahlman on the one side, claims said surplus, and on the other, others set up claims to have said surplus appropriated to debts, for which said testator was in his lifetime liable.

Also, the w. 1-2 of the n. w. 1-4, section 14, t. 43, n., range 12 e., and part of the n. e. fractional quarter of same section, laid out in lots in the town of Saint Johns, Lake county, State of Illinois. These lands are however claimed adversely by others, and the suit respecting the right to them is now pending in the Circuit Court of said last named county.

Also, an equitable right in some three acres of land lying south of, and adjacent to the city of Chicago, being part of the lands formerly owned by the late Samuel Ellis, deceased. The legal title to said lands is in other parties, and a litigation is now pending before the Cook County Circuit Court, concerning them.

Also, the legal title to lots No. 79 and 80, in what is called Cottage Grove, subdivision of part of the lands above referred to. The testator Rossetter had contracted to convey these lands to other persons, and part of the purchase money yet remains due to testator's estate.

9

That said Rossetter, also, had at the time of his death, sundry choses in action and unsettled claims. That those that Orator could collect have been collected and applied towards paying the debts and other charges against said Rossetter's estate.

That the principal share of the residue of said claims and choses, in action, are valueless and uncollectable.

That the chattel property and affects of said Rossetter, have been duly administered and appropriated as the law directs, under the sanction of the County Court, aforesaid.

That at the time of said Rossetter's death, he was largely indebted to sundry creditors, and was subject to heavy claims against him, secured

on his real estate—the full amount of which are not yet made known ; but so far as ascertained by said orator, the indebtedness of said Rossetter, over and above the sums paid by the said H. G. Shumway, trustee, exceed $20,000.

10

That Orator has made his annual report to, and settlement before the County Court of Cook; that a large number of claims have been adjudged and allowed by said Court against said Rossetter's Estate, which he as said Executor has been ordered to pay,and that other large claims have been filed in said Court for adjudication.

11

That debt aforesaid secured by said mortgage on lots 5 and 6, in block 6, in Kinzie's Addition to Chicago, was some years ago, together with the said mortgage, assigned to one Alfred Smith, who is now the owner of the same. That said mortgage contains a clause empowering the mortgagee and his assignee to sell the mortgaged property, in default of payment of any instalment. That the estate of said Rosetter owes the one-half of the note for One Thousand Dollars, past due as aforesaid, and the half of said Six Hundred Dollars interest, and that the said Smith threatens to sell the said property for the purpose of obtaining payment for his said debt. That Orator has no money or means in his hands of Rosetter's estate, or within his control, unless it be the real estate of said Rosetter, with which to pay off said debt, nor has he any money or means outside of said Real Estate, with which to pay off the debts aforesaid allowed, and to be allowed against said Rossetter's Estate, nor has he any money with which to pay Oratrix, Martha A. Rossetter, her annuity of $1000 per year, or any part thereof, or to appropriate to the support of George W. and Charles D. Rossetter, nor has he ever paid the said Martha A. Rosetter anything on her annuity, nor has he paid anything towards the said children of Rossetter.

That the personal estate of said Asher Rossetter was insufficient to pay the debts of said Rossetter, that the real estate of said Rossetter has been almost entirely unproductive—the rents, issues, and profits not being sufficient to pay the taxes thereon.

That the indebtedness of the estate of said Rossetter is such, and the condition of the said property is such, that it will not and cannot afford

revenues and profits any thing like sufficient to pay the debts of said estate, or save the encumbered property from sacrifice, much less will they pay the annuity to said Martha A. Rossetter, or anything towards the support and education of said children.

12—25

That in this condition of affairs, Orator deemed it his right and duty under said Will, to sell a portion of said Rossetter's Estate, and considering the condition of the property designated before as lots 5 and 6, that it has been, and will, in all probability, continue to be unproductive, unless large outlays shall be made in its improvement, Orator Pahlman, did on the 7th of September, 1859, enter into a contract in writing with one Wm. R. Smith, which was signed and sealed by said Smith and Orator, and which is filed herewith, and marked Exhibit F, by which Orator sold to said Smith the undivided half of the aforesaid lots 5 and 6, in Kinzie's Addition to Chicago, which was the property of said Rossetter at his death, and agreed to convey to said Smith by a deed with the usual covenants of a trustee, with power of sale, a good and perfect title, clear and free from all incumbrances, liens, taxes, and assessments, except the mortgage liens aforesaid, and the taxes and assessments, levied during the year 1859, and in consideration of the conveyance of the title aforesaid, the said Smith agreed to pay the one-half of the debt secured by the mortgage aforesaid, executed to Thomas Dyer, to wit: the half due from the estate of said Rossetter, and to pay orator $5000 in money upon delivery of a deed, or in case of dispute as to the title, then upon the same being decided by Court of competent jurisdiction, that the title would pass by such deed.

13

That said sale is just and beneficial to the estate of said testator, and all persons interested therein, and the price a just, full, and fair one for the said premises.

That Orator executed and tendered to the said defendent a proper deed for said premises, according to said agreement, bearing date the 12th of September, 1859, with the usual covenants in deeds of Trustees, and that the estate in fee in and to said premises, and a good and perfect title would have passed to the said defendent by said deed free from all incumbrances, liens, taxes, and assessments, except the taxes and assess-

ments levied during 1859; and the same was a full compliance with the said agreement, and he requested said defendant to accept of said deed and pay the said sum of $5000, due upon the delivery thereof—but defendant wholly refused, and still refuses so to do, alleging that the estate in fee did not and would not pass by said deed, and so as to convey a perfect title to defendant.

14—29

Copy of deed made, Exhibit C.

Prayer that defendant answer, and that such relief be given as to equity may appertain.

20

COPY OF LETTERS TESTAMENTORY.

22

The following renunciation filed by John B. King, named as one of the Executors of said Will, to wit: "The undersigned, John B. King, hereby wholly refuses to accept the Executorship of the last Will and Testament of Asher Rossetter, deceased. He further states that he has not intermeddled with the effects of the Testator since his decease, nor in any manner acted as Executor of said Will, and disclaims all interest in, and control of, the Real Estate of said deceased."

CHICAGO, March 3d, 1858.

JOHN B. KING, { L. S. }

23—24—25

Statement of assets and debts of Estate.

38—39

Demurrer to the bill.

40

Decree sustaining the demurrer and dismissing the bill.

41

Stipulation to take the case to the Supreme Court, First Grand Division.

44

Asssignment of errors.

44

1st. That the Circuit Court sustained the demurrer of the defendant to the plaintiff's Bill of Complaint in this behalf. 2d. The Circuit Court rendered a judgment for the defendant, and dismissed the said plaintiff's bill. 3d. The Circuit Court rendered a decree for the defendant, and against the plaintiff—whereas, by the laws of the land, judgment should have been rendered for the plaintiff.

Supreme Court of Illinois.

FIRST GRAND DIVISION.

MT. VERNON, NOVEMBER TERM, 1859.

JOHN D. PAHLMAN, Executor, &c., et. al.	ERROR TO COOK.
vs.	
WILLIAM R. SMITH.	

Defendant objects to the title on the ground that Pahlman has no power to sell and convey.

Pahlman claims to have the power of sale under the will of A. Rossetter.

1.

The testator first appointed plaintiff John D. Pahlman and John B. King executors, and the survivor of them, and in same sentence of the will continues: "And after the payment of all my debts and charges, I dispose of my estate as follows: I give and devise all my messuages,

lands and tenements, wheresoever situated, unto the said John Pahlman and John B. King, and their heirs, and the heirs of the survivors of them, to have and to hold the same to the uses following, to wit: to the use of them the said John Pahlman and John King, executors and the survivor of them, and his heirs, for, and during, and until the time when my youngest child Charles D. Rossetter shall arrive at the age of maturity, or 21 years of age, and, that, then and thenceforth the said King and Pahlman shall cease to exercise any further control over the same, but the title to all my said lands and tenaments, shall then vest absolutely in my said children—subject however, to the following conditions: that the said Pahlman and King shall upon my daughter, Mary, coming of age, or in case she shall marry before arriving at the age of maturity, then and in either case, any of the said executors shall give and set over to her or her husband, in case she marries, from and out of my estate, such an amount as they, the said Pahlman and King, shall deem a third of the property left by me at my death, both real and personal.

As also, upon my son George W. Rossetter, coming of age, then said King and Pahlman shall in like manner set off to him so much of my estate as they shall consider equivalent to a third of the whole amount left at the time of my death.

2.

And when my youngest son, Charles Decatur Rossetter, shall come of age, then the said King and Pahlman shall set over to him as much as each of my other children shall have received; and if there shall be anything remaining after such distribution, arising from the rents and profits, or in any other way, from my real and personal estate, it shall be divided equally between my said children and their heirs."

"And the freehold which I devise to the said King and Pahlman, and the survivor of them, for, and during, and until the maturity of all my children, is upon the special trust following, to wit: That they, the said King and Pahlman, and survivor of them, shall, during the continuance of the said estate, take and receive the rents and profits accruing from the messuages, lands and tenements aforesaid, and therewith make all necessary repairs, and pay all taxes and other necessary charges and expenses in and about the same, and after all such payments deducted—shall in their discretion pay over the residue of said rents and profits to

my said children in equal proportions, or shall use the same for the maintenance, education, and support of my said children, as they, the said King and Pahlman, and survivor may deem proper and expedient.

"Subject, however, to this condition, that before the payment of said residue to my said children, they the said King and Pahlman, shall pay to my wife, Martha A. Rossetter instead, and in her place of her right to dower, the amount or yearly rent of One Thousand Dollars each, and every year during the term of her natural life," payable quarterly.

3.

"And I do further authorize and empower the said King and Pahlman, my executors, and the survivor of them, in case my personal estate shall be insufficient to pay my just debts, and incidental charges, as also, the annuity for my said wife, and support for my said children—to sell and convey in fee simple, or for a less estate, and for such prices as they may judge expedient, such parts of my messuages, lands and tenements aforesaid, as may be necessary for that purpose, and the proceeds of such sales to appropriate thereto; and further, the receipts in writing of my said children, or wife, to the said Pahlman and King, for any sum or sums of money paid them, by virtue of this Will and Testament, shall be a good and sufficient discharge unto them, and *every* of them therefor."

The Testator first appointing King and Pahlman Executors, devises to them by name and their heirs, either a base fee defeasible upon the arrival of age of the youngest heir—or upon the death of the widow—all his lands, &c.

Subject to set over to his daughter on her maturity or marriage, an amount of the *estate*, that Executors shall deem one-third of the property, real and personal.

And so, also, to Geo. W., upon his arriving at age—and again to Charles D., upon his coming of age—and to distribute the balance, if any remains.

The freehold as above devised, and subject as above, was upon the special trust, that they and *survivors* shall take rents and profits—repair,

pay taxes, expenses, &c., and in their *discretion*, pay the residue to the children, *or* shall *use it* for their *maintenance* and *education*, as they, or the *survivor* may deem proper.

But subject, before such *residue* is payable to the children—to pay the widow $1000 *per annum during her natural life*, in lieu of dower.

With power in "said *King and Pahlman, my Executors* and the *survivor* of them," to sell and convey in fee or a less estate, any of the lands, &c., to make up any deficiency of the personal property, in paying *debts* and expenses, the *annuity*, or the *support* of the children—and makes a *receipt* of the wife or children a *discharge*.

4.

Now, it seems to us immaterial, whether a chattel interest for a term of years, or a base fee, was devised to King and Pahlman, or whether they took it as *Trustees*, or as *Executors*—it was devised, subject to the payment of the *debts*, *expenses*, *annuity*, and *support* of the children—and power is given to them as Executors to sell—and they are charged with the duty of *paying* the *debts*, *charges* and *taxes*, *making the repairs*, paying the *annuity*, and of paying over any *residue* or of applying it to the *support* and *education* of the children. So that the *duties* of the *Executor* in the payment of the *debts*, and annuity are impressed upon them, as well in the causes describing them individually, as in the clauses which describe them as Executors.

We are thus forced to conclude, that it was the intention of the testator, to speak of them, in all places as his Executors—and all powers conferred, and duties prescribed, are in that character. The following authorities will show that when the duties of Executors are imposed, in a Will, the powers necessary to perform them will appertian to them as Executors.

And, also, that the *survivor*, or *acting Executor*, may act, when the will authorizes the *survivor* to do wnat is required.

A devise for the payment of debts is favored in equity, and a devise to Trustees for the payment of debts, will give them an estate in fee simple, without any word of limitation, as being necessary for the discharge of their trust.

Hill on Trustees, 349.
Dover v. Gregory, Sim. R. 393.

5.

Although when the devise is to the Executors, they have been held to take, only a chattel interest for the satisfaction of the debts.

And in cases of doubtful construction—equity will endeavor to put such a construction on them as is most favorable to the creditors.

id.

Where "the Executors *are also devisers of the real estate*, a general direction, that all debts shall be paid by them, though discribing them as Executors, will create a charge upon the reality; and it is immaterial that the real estate, is first devised by *name* to the individuals, who afterwards are appointed Executors, and are directed to pay the debts—for that direction will be held to over-ride the whole interest which the persons, who are named Executors, take under the Will."

Hill on Trustees, 347.
Clowdely v. Pelhman, 1 Vernon R. 411.
Baker v. Duke of Devonshire, 3 Meriv 310.

Where the person, who is appointed Trustee, makes a proper refusal or disclaimer, the effect is, that all parties are placed precisely in the same situation, relatively, to the trust property, as if the disclaiming party had not been named in the trust instrument, whether it be Deed or Will.

Hill on Trustee, 225.
Smith v. Wheeler, 1 Ventris R. 128.
Townson v. Ticknel 3 Bamw and Ald. 31.
Begbie v. Crook, 2 Bingd. N. C. 70.

6.

If the person disclaiming be one of two or more trustees, the entire estate is vested in the other trustee or trustees.

Hill on Trusts, 226.
Bonifart v. Greenfield, 2 Ventris R. 194.
Thompson v. Leach, 2 Ventris. R. 195.
Dean v, Judge, 11 East. R. 288.

And this disclaimer will have relation back to the time of the gift, and thereupon the estate will rest in the representative of a deceased Trustee, or in the survivor of the deceased Trustee, exactly as though the person disclaiming had never been named as a Trustee.

Stacy v. Elph, 1 Mylne v. Keene, 195.

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When one of two or more Trustees disclaims, the remaining Trustees or Trustee, will take not only the entire legal estate, but all the powers and authorities vested in the Trustees as such, and which are requisite for the administration of the trust. Therefore, they will be able of themselves to grant leases of the trust estate.

Small v. Marwood, 9 Bamrv. v. Cress. 307.

To sell and convey to the purchaser.

Creme v. Dickens, 4 Ves. Jr. 97,100
Adams v. Famton, 5 Mad. 435.
Nicholson v. Woodworth, 2 Swanst, 675.
2 Sugd. Vend, & P., 51.

And the concurrence of the disclaiming party, in any of the acts, is not necessary, and cannot therefore be enforced, and it is immaterial that he is expressly named in the trust instrument as one of the parties by whom the power is to be exercised.

Id., as above.

7.

A power given to the trustee, or the "*survivor*," may be exercised by the "*acting*" trustee, on the refusal of the others.

Sharp v. Sharp, 2 B. and Ald. 405.
See Eaton v. Smith, 2 Bearan, 236.

For instance, where a power is given to two or more persons, *by name, without any words of survivorship*, it cannot be exercised by the others alone, after the death or renunciation of any one of the donors.

Sugden on Powers, 141-4-6.
Hill on Trustees, 472.

But where the power is given to several persons by name, (*as Trustees*) and "the *survivors and survivor*, and the heirs of the survivors," it is settled that the power may be well exercised, by the *only acting* Trustee, or his heirs, in case the others renounce the trust.

Hill on Trustee, 473.
Hankins v. Kemp, 3, East, 410.
Cooke v. Crawford, 13, Sim. 91.
Eaton v. Smith, 2, Bearon, 239.
See Darone v. Fanning, 2 John ch., R. 252.
Sharp v. Sharp, 2 Bam. and Old. 405.

8.

And so if a power of sale be created by will, but without declaring by whom it is to be exercised, but the proceeds of the sale are directed to be applied, or distributed by the Executor, or any other person, the Executor, or that other person, will take the power of selling by implication, unless a contrary intention appear from the Will.

Hill on Trustee, 473,
Newton v. Bennett, Brown c. c., 135.
Elton v. Harrison, 2 Sivanst. 276.
Blatch v. Wilber, 1 Atk. R., 420.
Bentham v. Whiltshire, 4 Mad. 444.
Forbes v, Peacock, 11 Suir. 152, 160.
Curtis v. Fulbrook, 8 Hane R., 28 and notes.
Forbes v. Peacock 12 Sim. R. 528, 539, 548, and cases cited at pages 537-8.
Same v. Same, 11 Mees and Wds. R. 630.
Same v. Same, 1 Phillip's R. 717.

Now this last case shows very clearly that where the Will charges the debts as legacies upon the land, or orders it to be sold for that purpose, that the power will belong by implication, to the executors, *because* the duty of paying the debts or legacies appertains to them. The power will appertain to those charged with the duty, and will consequently *survive*, or belong to the *acting* Executor, or Trustee.

The same result will follow, where the power is conferred upon the office of Executor, instead of the individual name of the Executor.

The power also *survives*, and the acting Executor may exercise it, in all cases where it is given in language to the "*survivors or survivor*," &c., and this is put upon the ground of *exprees intention* of the Grantor or Testator—and is so at the Common Law.

In this case, therefore, Pahlman would be entitled at Common Law, to exercise this power, as the sole *acting* Executor, by and under the express direction of the Will, because that power was given to them by name, as "my Executor and the *survivor* of them."

So that the power was not only given to the *office* of the Executor, but expressly to the *survivor*, and would survive, and might be executed at

Common Law by the sole acting Executor, even in cases of naked powers.

Clinefelter v. Ayers, 16, Ills. R., 329.

9.

But we might go even one step further, and admit that Pahlman could not exercise it alone under the circumstances in this case, by the principles of Common Law, yet the Statute of 21 Hen. 8 cap 4, would meet the case, where one renounces as here—and that Statute is in force here.

16 Ills. R. 329.

Admitting that there was no estate in the lands devised, but simply a power of sale—and still there seems no ground left to question the title here for want of a power of sale in Pahlman alone—either under the Statute of Hen. 8, or at the Common Law, and the Court must decree a specific performance by defendant.

Defendant objects to close the purchase, on the ground that the power conferred by the Will, was a naked power, uncoupled with any trust or interest in the trustee or executor, and therefore cannot be exercised by one, and that it is optionary, and no one can compel him or them to execute it.

For argument's sake, I will admit that is a naked power, without an interest in the Executor, Pahlman, but is coupled with a trust for the benefit of the creditors, for whose benefit it is in part made, and for the legatee—and for the maintenance and education of the children. It is therefore, not a naked power in the Common Law sense, requiring all the grantees to join in its execution.

First—because the very language of the Will gives it to the *survivor*, and one can, as sole *acting* Executor or Trustee, execute it as *survivor* in the sense of the testator's intention.

And second—I offer the following considerations, upon authority—

10

"If the power is one which it is the duty of the party to execute, made the duty by the regulations of the Will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the execution of the power, and

without discretion, whether he will execute it or not; and the Court adopts the principle relative to trusts, and will not permit his negligence, accident or other circumstances to disappoint the interest of those for whose benefit he is called upon to execute it.

Withers v. Yeadon, 1 Rich. Eq. R., 329, 330-1.
Brown v. Higgs, 8 Ves. Jr., 574.
Osgood v, Franklin, 2 John C. R., 21, 14, John R. 527.
Bull v. Bull, 8 Conn. R., 47.
Harrisons v. Harrisons, 2 Gratt, 10.
Dobney v. Manning, et. al., 3 Ohio 321-4.
1 Sugden on Powers, 118 and note, 120 and note, 126 and note.

A power only passed by this Will.

Doe v. Hampton, 8 Ad. and Ell. 905.
Yates v. Compton, 3 P. Wm's. R. 308.
Howell v. Barnes, Croke Car. 382.
Sugden on Powers, 130.

But we are to look to the whole Will, and if it evince a design, that at all events, the lands are to be sold in order to satisfy *the whole intent* of the Will, it is not a *naked* power, but is *coupled with a trust* and all interest.

Sugden on Powers, 134 and note 1.
Franklin v. Osgood, 14 John R. 527.

A power to sell for the payment of debts would be such a power.

Jackson v. Ferris, 15 John R. 346.
Lessee of Zeback v. Smith, 3 Binney 69.
Nelson v. Carrington, 4 Mumf. R. 332 pl. 9.
Digge's Lessee v. Jannan, 4 Harr. & McHen. 485.
Woodbridges Him. v. Watkins, 3 Bibb. 349.
11 4 Kent's Com. 326-7-8.

The case in Binney is strongly in point, in its facts, as well as decision.

So in Harris & McHenry.
Croke Car. 382.
Hardresse, 405, 419.
1 Cha. Rep. 35.

I think those cases with the following, perfectly conclusive, when appled to this case.

2 Story Eq. Sims. Sects. 1060 to 1064, inclusive and notes.
Peter et. al. v. Berenly et. al., 10 Pet. R. 532.
Bark U. S. v. Berenly, 1 Howard U. S. R. 134.
Marsh v. Wheeler et. al., 2 Edwd—ch. R. 156.
Shilton v. Homer et. al., 5 Metcalf 465.

SCATES & RUCKER,

FOR PLAINTIFF IN ERROR.

Reporter

Supreme Court of Illinois.

FIRST GRAND DIVISION.

MT. VERNON, NOVEMBER TERM, 1859.

JOHN D. PAHLMAN, Executor, &c., et. al.
vs.
WILLIAM R. SMITH.
} ERROR TO COOK.

POINTS FOR PLAINTIFF IN ERROR.

SCATES & RUCKER,
FOR PLAINTIFF IN ERROR.

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Supreme Court of Illinois.

FIRST GRAND DIVISION.

MT. VERNON, NOVEMBER TERM, 1859.

JOHN D. PAHLMAN, Executor, &c., et. al.
vs.
WILLIAM R. SMITH.
} ERROR TO COOK.

ABSTRACT.

Record p. 3.

Bill Charges—That Asher Rossetter, a resident of Chicago, departed this life about the 25th of February, 1858, having made his will, and which was duly proven and recorded in Cook county, on the 2nd of March, 1858:

That plaintiff was appointed, with one John B. King, executors.

That said Rossetter devised all his lands, &c., to his executors and to their heirs—the survivors of them, after the payment of all his debts, to have and to hold the same to the use of the executors, for and during

and until the time the youngest child of testator, Charles D. Rossetter, arrives at maturity, and that executors should thenceforth cease to exercise any further control over said premises, but the title to all his lands should then vest absolutely in his testator's children:

4

That the devise aforesaid was made subject to the condition following, viz: That upon the arrival at age, or in case of marriage of his daughter before she arrives at age, that then and in either case said executors should give and set over to said daughter or her husband, such an amount of his estate as said executors should deem a third of the property, real and personal, left by testator, at his death, that also upon the oldest son coming of age, a like amount should be set off to him, by the executors, and upon the youngest son coming of age, as much should also be set off to him as the other children had received.

That in case of the death of either of said children during minority, leaving no issue, then his or her portion should be equally divided between the survivor or survivors; but in case issue was left, then the portion should go to them.

5

Testator further provided by said devise that the devise to the executors should be subject to the further trusts; that said executors, and the survivor of them, should, during the continuance of their estate, receive the rents and profits of the real estate devised to them, and out of these rents, &c., to pay for repairs, taxes, and necessary charges, and expenses; and then to pay the widow of testator, in lieu of dower, one thousand dollars per annum, during her natural life, in quarterly instalments; and the balance of said rents to pay over in their discretion, to the children for their maintainance, education and support, as said executors, or the survivors might deem expedient.

That in case the personal estate should prove insufficient to pay the debts, incidental charges, and the said annuity to the widow, and to support the said children, then the executors and the survivors of them, were authorized to sell and convey in fee simple, or for a less estate, and for such prices as said executors might deem expedient, such parts of the real estate, as might be necessary to pay said debts, annuity and support and maintainance of the children, and to appropriate the proceeds thereto.

16

Said Will is made part of the bill, and is as follows:

"Know all men by these present that I, Asher Rossetter, of the city of Chicago, county of Cook, and State of Illinois, being in delicate health, but of sound and disposing mind and memory, and being desirous to settle my worldly affairs, while I have strength and capacity so to do, do make and publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made.

And I do hereby constitute and appoint John D. Pahlman, John B. King, all of Chicago, County and State aforesaid, and the survivor of them, executors and executor of this my last will and testament.

And after the payment of all my past debts and charges, I dispose of my estate as follows:

I give and devise all my messuages, lands, and tenements wheresoever situate, unto the said John Pahlman and John B. King, and their heirs, and the heirs of the survivor of them, to have and to hold the same to the uses following to wit: To the use of them the said John Pahlman and John King executors, and the survivor of them and his heirs, for and during and until the time when my youngest child, Charles Decatur Rossetter, shall arrive at the age of maturity, or twenty-one years of age, and that then and from thenceforth the said King and Pahlman shall cease to exercise any further control over the same; but the title to all my said lands and tenements, shall then vest absolutely in my said children, subject however, to the following condition:

That the said Pahlman and King shall upon my daughter, Mary S., coming of age, or in case she shall marry before arriving at the age of maturity, then and in either case, they the said executors shall give and set over to her or to her husband, in case she marries, from and out of my estate such an amount as they the said King and Pahlman shall deem a third of the property left by me at my disease, both real and personal.

As also upon my son, George W. Rossetter, coming of age, then said King and Pahlman shall in like manner set off to him so much of my estate as they shall consider equivalent to one-third of the property left at the time of my death.

And when my youngest son, Charles Decatur Rossetter shall come of

age then the said King and Pahlman shall set over to him as much sa each of my other said children shall receive, and if there shall be anything remaining after such distribution, arising from the rents and profits or in any other way from my real and personal estate, it shall be divided equally between my said children and their heirs, and in case of the death of one or more of my said children without heirs, before arriving at the age of maturity, then and in that case their portion of my estate to which, by the provisions of this will, they would be entitled, either real or personal, shall go to and be divided equally between survivors or survivor of them.

And if any or either of my said children die, before arriving at the age of maturity, leaving issue, then such issue shall be entitled to the same proportion of my estate as the parent of said child or children would be under the provisions of the will.

And the freehold which I have devised to the said King and Pahlman and the survivors for and during and until the maturity of all my said children, is upon the especial trust following to wit: That they, the said King and Pahlman, and the survivors of them shall, during the continuance of the said estate, take and receive the rents and profits accruing from the messuages, lands and tenements aforesaid, and therewith make all necessary repair, and pay all taxes, and all other necessary charges and expenses in and about the same, and after all such payments deducted, shall in their discretion, pay over the residue of said rents and profits to my said children, in equal proportion, or shall use the same for the maintenance, education, and support of my said children, as they the said King and Pahlman, or survivor, may deem proper and expedient.

Subject, however, to this condition: That before the payment of said residue, to my said children, they, the said King and Pahlman, shall pay to my wife, Martha A. Rossetter, instead, and in the place of her right to Dower, the annuity or yearly rent of One Thousand Dollars, each and every year, during the term of her natural life. And the said annuity or yearly rent shall be paid to my said wife, in four equal quarterly payments per year, on the first day of January, and on the first day of May and September in every year, the said payment to begin and to be made on such of the said days as shall next happen after my decease. And I do further authorize and empower the said King and Pahlman, my executors, and the survivor of them, in case my personal estate shal

be insufficient to pay my just debts and incidental charges, as also the annuity for my said wife, and support for my said children, to sell and convey in fee simple, or for a less estate, and for such prices as they may judge expedient, such parts of my messuages, lands, and tenements aforesaid, as may be necessary for that purpose, and the proceeds of such sale to appropriate thereto; and further, the receipts in writing of my said children or wife to the said Pahlman and King, for any sum or sums of money paid them by virtue of this Will and Testament, shall be a good and sufficient discharge unto them, and every of them therefor.

6

That John D. Pahlman duly qualified as executor, and took upon himself the burden of executing the said Will of said Rossetter, and letters testamentary were duly issued to him; that he has been ever since, and now is, acting as such executor, and makes profert of his said letters testamentary.

That, his co-executor, John B. King, never accepted the executorship of said Will, nor any of the rights, interests, or trusts therein created or conveyed, but wholly refused the same, and has by his writing under seal, duly executed and filed in the County Court, wholly renounced said executorship, and all the estate and trusts created in and conferred upon him by said Will, and all control over the same, which said renunciation was accepted by the Court and entered of Record.

7

That testator was seized at his death of an undivided half of lots five and six, in block six, in Kinzie's addition to Chicago, with improvements —in fee simple—subject to a mortgage upon the whole, for the sum of $16,000, the balance of the purchase money due thereon.

8

Also, an equitable interest in the s. 1-4 of block 69, in school section addition to Chicago. The legal title to which was in Buckner S. Morris, subject to a trust deed on same, given by said Rossetter to H. G. Shumway as Trustee, to secure certain indebtedness of said testator, amounting to some $16,000 and upwards, and said indebtedness not having been paid, as provided for by said Rossetter, said premises have been sold by said Trustee, for the sum of $30,000, and said Trustee still holds the surplus money, after paying the debt secured, interest,

costs, and expenses, and refuses to pay it to Orator Pahlman, and proceedings are now pending in Court, in which Pahlman on the one side, claims said surplus, and on the other, others set up claims to have said surplus appropriated to debts, for which said testator was in his lifetime liable.

Also, the w. 1-2 of the n. w. 1-4, section 14, t. 43, n., range 12 e., and part of the n. e. fractional quarter of same section, laid out in lots in the town of Saint Johns, Lake county, State of Illinois. These lands are however claimed adversely by others, and the suit respecting the right to them is now pending in the Circuit Court of said last named county.

Also, an equitable right in some three acres of land lying south of, and adjacent to the city of Chicago, being part of the lands formerly owned by the late Samuel Ellis, deceased. The legal title to said lands is in other parties, and a litigation is now pending before the Cook County Circuit Court, concerning them.

Also, the legal title to lots No. 79 and 80, in what is called Cottage Grove, subdivision of part of the lands above referred to. The testator Rossetter had contracted to convey these lands to other persons, and part of the purchase money yet remains due to testator's estate.

9

That said Rossetter, also, had at the time of his death, sundry choses in action and unsettled claims. That those that Orator could collect have been collected and applied towards paying the debts and other charges against said Rossetter's estate.

That the principal share of the residue of said claims and choses, in action, are valueless and uncollectable.

That the chattel property and affects of said Rossetter, have been duly administered and appropriated as the law directs, under the sanction of the County Court, aforesaid.

That at the time of said Rossetter's death, he was largely indebted to sundry creditors, and was subject to heavy claims against him, secured

on his real estate—the full amount of which are not yet made known ; but so far as ascertained by said orator, the indebtedness of said Rossetter, over and above the sums paid by the said H. G. Shumway, trustee, exceed $20,000.

10

That Orator has made his annual report to, and settlement before the County Court of Cook; that a large number of claims have been adjudged and allowed by said Court against said Rossetter's Estate, which he as said Executor has been ordered to pay,and that other large claims have been filed in said Court for adjudication.

11

That debt aforesaid secured by said mortgage on lots 5 and 6, in block 6, in Kinzie's Addition to Chicago, was some years ago, together with the said mortgage, assigned to one Alfred Smith, who is now the owner of the same. That said mortgage contains a clause empowering the mortgagee and his assignee to sell the mortgaged property, in default of payment of any instalment. That the estate of said Rosetter owes the one-half of the note for One Thousand Dollars, past due as aforesaid, and the half of said Six Hundred Dollars interest, and that the said Smith threatens to sell the said property for the purpose of obtaining payment for his said debt. That Orator has no money or means in his hands of Rosetter's estate, or within his control, unless it be the real estate of said Rosetter, with which to pay off said debt, nor has he any money or means outside of said Real Estate, with which to pay off the debts aforesaid allowed, and to be allowed against said Rossetter's Estate, nor has he any money with which to pay Oratrix, Martha A. Rossetter, her annuity of $1000 per year, or any part thereof, or to appropriate to the support of George W. and Charles D. Rossetter, nor has he ever paid the said Martha A. Rosetter anything on her annuity, nor has he paid anything towards the said children of Rossetter.

That the personal estate of said Asher Rossetter was insufficient to pay the debts of said Rossetter, that the real estate of said Rossetter has been almost entirely unproductive—the rents, issues, and profits not being sufficient to pay the taxes thereon.

That the indebtedness of the estate of said Rossetter is such, and the condition of the said property is such, that it will not and cannot afford

revenues and profits any thing like sufficient to pay the debts of said estate, or save the encumbered property from sacrifice, much less will they pay the annuity to said Martha A. Rossetter, or anything towards the support and education of said children.

12—25

That in this condition of affairs, Orator deemed it his right and duty under said Will, to sell a portion of said Rossetter's Estate, and considering the condition of the property designated before as lots 5 and 6, that it has been, and will, in all probability, continue to be unproductive, unless large outlays shall be made in its improvement, Orator Pahlman, did on the 7th of September, 1859, enter into a contract in writing with one Wm. R. Smith, which was signed and sealed by said Smith and Orator, and which is filed herewith, and marked Exhibit F, by which Orator sold to said Smith the undivided half of the aforesaid lots 5 and 6, in Kinzie's Addition to Chicago, which was the property of said Rossetter at his death, and agreed to convey to said Smith by a deed with the usual covenants of a trustee, with power of sale, a good and perfect title, clear and free from all incumbrances, liens, taxes, and assessments, except the mortgage liens aforesaid, and the taxes and assessments, levied during the year 1859, and in consideration of the conveyance of the title aforesaid, the said Smith agreed to pay the one-half of the debt secured by the mortgage aforesaid, executed to Thomas Dyer, to wit: the half due from the estate of said Rossetter, and to pay orator $5000 in money upon delivery of a deed, or in case of dispute as to the title, then upon the same being decided by Court of competent jurisdiction, that the title would pass by such deed.

13

That said sale is just and beneficial to the estate of said testator, and all persons interested therein, and the price a just, full, and fair one for the said premises.

That Orator executed and tendered to the said defendent a proper deed for said premises, according to said agreement, bearing date the 12th of September, 1859, with the usual covenants in deeds of Trustees, and that the estate in fee in and to said premises, and a good and perfect title would have passed to the said defendent by said deed free from all incumbrances, liens, taxes, and assessments, except the taxes and assess-

ments levied during 1859; and the same was a full compliance with the said agreement, and he requested said defendant to accept of said deed and pay the said sum of $5000, due upon the delivery thereof—but defendant wholly refused, and still refuses so to do, alleging that the estate in fee did not and would not pass by said deed, and so as to convey a perfect title to defendant.

14—29

Copy of deed made, Exhibit C.

Prayer that defendant answer, and that such relief be given as to equity may appertain.

20

COPY OF LETTERS TESTAMENTORY.

22

The following renunciation filed by John B. King, named as one of the Executors of said Will, to wit: "The undersigned, John B. King, hereby wholly refuses to accept the Executorship of the last Will and Testament of Asher Rossetter, deceased. He further states that he has not intermeddled with the effects of the Testator since his decease, nor in any manner acted as Executor of said Will, and disclaims all interest in, and control of, the Real Estate of said deceased."

CHICAGO, March 3d, 1858.

JOHN B. KING, { L. S. }

23—24—25

Statement of assets and debts of Estate.

38—39

Demurrer to the bill.

40

Decree sustaining the demurrer and dismissing the bill.

41

Stipulation to take the case to the Supreme Court, First Grand Division.

44

Asssignment of errors.

44

1st. That the Circuit Court sustained the demurrer of the defendant to the plaintiff's Bill of Complaint in this behalf. 2d. The Circuit Court rendered a judgment for the defendant, and dismissed the said plaintiff's bill. 3d. The Circuit Court rendered a decree for the defendant, and against the plaintiff—whereas, by the laws of the land, judgment should have been rendered for the plaintiff.

Supreme Court of Illinois.

FIRST GRAND DIVISION.

MT. VERNON, NOVEMBER TERM, 1859.

JOHN D. PAHLMAN, Executor, &c., et. al.	ERROR TO COOK.
vs.	
WILLIAM R. SMITH.	

Defendant objects to the title on the ground that Pahlman has no power to sell and convey.

Pahlman claims to have the power of sale under the will of A. Rossetter.

1.

The testator first appointed plaintiff John D. Pahlman and John B. King executors, and the survivor of them, and in same sentence of the will continues: "And after the payment of all my debts and charges, I dispose of my estate as follows: I give and devise all my messuages,

lands and tenements, wheresoever situated, unto the said John Pahlman and John B. King, and their heirs, and the heirs of the survivors of them, to have and to hold the same to the uses following, to wit: to the use of them the said John Pahlman and John King, executors and the survivor of them, and his heirs, for, and during, and until the time when my youngest child Charles D. Rossetter shall arrive at the age of maturity, or 21 years of age, and, that, then and thenceforth the said King and Pahlman shall cease to exercise any further control over the same, but the title to all my said lands and tenaments, shall then vest absolutely in my said children—subject however, to the following conditions: that the said Pahlman and King shall upon my daughter, Mary, coming of age, or in case she shall marry before arriving at the age of maturity, then and in either case, any of the said executors shall give and set over to her or her husband, in case she marries, from and out of my estate, such an amount as they, the said Pahlman and King, shall deem a third of the property left by me at my death, both real and personal.

As also, upon my son George W. Rossetter, coming of age, then said King and Pahlman shall in like manner set off to him so much of my estate as they shall consider equivalent to a third of the whole amount left at the time of my death.

2.

And when my youngest son, Charles Decatur Rossetter, shall come of age, then the said King and Pahlman shall set over to him as much as each of my other children shall have received; and if there shall be anything remaining after such distribution, arising from the rents and profits, or in any other way, from my real and personal estate, it shall be divided equally between my said children and their heirs."

"And the freehold which I devise to the said King and Pahlman, and the survivor of them, for, and during, and until the maturity of all my children, is upon the special trust following, to wit: That they, the said King and Pahlman, and survivor of them, shall, during the continuance of the said estate, take and receive the rents and profits accruing from the messuages, lands and tenements aforesaid, and therewith make all necessary repairs, and pay all taxes and other necessary charges and expenses in and about the same, and after all such payments deducted—shall in their discretion pay over the residue of said rents and profits to

my said children in equal proportions, or shall use the same for the maintenance, education, and support of my said children, as they, the said King and Pahlman, and survivor may deem proper and expedient.

"Subject, however, to this condition, that before the payment of said residue to my said children, they the said King and Pahlman, shall pay to my wife, Martha A. Rossetter instead, and in her place of her right to dower, the amount or yearly rent of One Thousand Dollars each, and every year during the term of her natural life," payable quarterly.

3.

"And I do further authorize and empower the said King and Pahlman, my executors, and the survivor of them, in case my personal estate shall be insufficient to pay my just debts, and incidental charges, as also, the annuity for my said wife, and support for my said children—to sell and convey in fee simple, or for a less estate, and for such prices as they may judge expedient, such parts of my messuages, lands and tenements aforesaid, as may be necessary for that purpose, and the proceeds of such sales to appropriate thereto; and further, the receipts in writing of my said children, or wife, to the said Pahlman and King, for any sum or sums of money paid them, by virtue of this Will and Testament, shall be a good and sufficient discharge unto them, and *every* of them therefor."

The Testator first appointing King and Pahlman Executors, devises to them by name and their heirs, either a base fee defeasible upon the arrival of age of the youngest heir—or upon the death of the widow—all his lands, &c.

Subject to set over to his daughter on her maturity or marriage, an amount of the *estate*, that Executors shall deem one-third of the property, real and personal.

And so, also, to Geo. W., upon his arriving at age—and again to Charles D., upon his coming of age—and to distribute the balance, if any remains.

The freehold as above devised, and subject as above, was upon the special trust, that they and *survivors* shall take rents and profits—repair,

pay taxes, expenses, &c., and in their *discretion*, pay the residue to the children, *or* shall *use it* for their *maintenance* and *education*, as they, or the *survivor* may deem proper.

But subject, before such *residue* is payable to the children—to pay the widow $1000 *per annum during her natural life*, in lieu of dower.

With power in "said *King and Pahlman, my Executors* and the *survivor* of them," to sell and convey in fee or a less estate, any of the lands, &c., to make up any deficiency of the personal property, in paying *debts* and expenses, the *annuity*, or the *support* of the children—and makes a *receipt* of the wife or children a *discharge*.

4.

Now, it seems to us immaterial, whether a chattel interest for a term of years, or a base fee, was devised to King and Pahlman, or whether they took it as *Trustees*, or as *Executors*—it was devised, subject to the payment of the *debts*, *expenses*, *annuity*, and *support* of the children—and power is given to them as Executors to sell—and they are charged with the duty of *paying* the *debts*, *charges* and *taxes*, *making the repairs*, paying the *annuity*, and of paying over any *residue* or of applying it to the *support* and *education* of the children. So that the *duties* of the *Executor* in the payment of the *debts*, and annuity are impressed upon them, as well in the causes describing them individually, as in the clauses which describe them as Executors.

We are thus forced to conclude, that it was the intention of the testator, to speak of them, in all places as his Executors—and all powers conferred, and duties prescribed, are in that character. The following authorities will show that when the duties of Executors are imposed, in a Will, the powers necessary to perform them will appertian to them as Executors.

And, also, that the *survivor*, or *acting Executor*, may act, when the will authorizes the *survivor* to do wnat is required.

A devise for the payment of debts is favored in equity, and a devise to Trustees for the payment of debts, will give them an estate in fee simple, without any word of limitation, as being necessary for the discharge of their trust.

Hill on Trustees, 349.
Dover v. Gregory, Sim. R. 393.

5.

Although when the devise is to the Executors, they have been held to take, only a chattel interest for the satisfaction of the debts.

And in cases of doubtful construction—equity will endeavor to put such a construction on them as is most favorable to the creditors.

id.

Where "the Executors *are also devisers of the real estate*, a general direction, that all debts shall be paid by them, though discribing them as Executors, will create a charge upon the reality; and it is immaterial that the real estate, is first devised by *name* to the individuals, who afterwards are appointed Executors, and are directed to pay the debts—for that direction will be held to over-ride the whole interest which the persons, who are named Executors, take under the Will."

Hill on Trustees, 347.
Clowdely v. Pelhman, 1 Vernon R. 411.
Baker v. Duke of Devonshire, 3 Meriv 310.

Where the person, who is appointed Trustee, makes a proper refusal or disclaimer, the effect is, that all parties are placed precisely in the same situation, relatively, to the trust property, as if the disclaiming party had not been named in the trust instrument, whether it be Deed or Will.

Hill on Trustee, 225.
Smith v. Wheeler, 1 Ventris R. 128.
Townson v. Ticknel 3 Bamw and Ald. 31.
Begbie v. Crook, 2 Bingd. N. C. 70.

6.

If the person disclaiming be one of two or more trustees, the entire estate is vested in the other trustee or trustees.

Hill on Trusts, 226.
Bonifart v. Greenfield, 2 Ventris R. 194.
Thompson v. Leach, 2 Ventris. R. 195.
Dean v, Judge, 11 East. R. 288.

And this disclaimer will have relation back to the time of the gift, and thereupon the estate will rest in the representative of a deceased Trustee, or in the survivor of the deceased Trustee, exactly as though the person disclaiming had never been named as a Trustee.

Stacy v. Elph, 1 Mylne v. Keene, 195.

[illegible]

When one of two or more Trustees disclaims, the remaining Trustees or Trustee, will take not only the entire legal estate, but all the powers and authorities vested in the Trustees as such, and which are requisite for the administration of the trust. Therefore, they will be able of themselves to grant leases of the trust estate.

Small v. Marwood, 9 Bamrv. v. Cress. 307.

To sell and convey to the purchaser.

Creme v. Dickens, 4 Ves. Jr. 97,100
Adams v. Famton, 5 Mad. 435.
Nicholson v. Woodworth, 2 Swanst, 675.
2 Sugd. Vend, & P., 51.

And the concurrence of the disclaiming party, in any of the acts, is not necessary, and cannot therefore be enforced, and it is immaterial that he is expressly named in the trust instrument as one of the parties by whom the power is to be exercised.

Id., as above.

7.

A power given to the trustee, or the "*survivor*," may be exercised by the "*acting*" trustee, on the refusal of the others.

Sharp v. Sharp, 2 B. and Ald. 405.
See Eaton v. Smith, 2 Bearan, 236.

For instance, where a power is given to two or more persons, *by name, without any words of survivorship*, it cannot be exercised by the others alone, after the death or renunciation of any one of the donors.

Sugden on Powers, 141-4-6.
Hill on Trustees, 472.

But where the power is given to several persons by name, (*as Trustees*) and "the *survivors and survivor*, and the heirs of the survivors," it is settled that the power may be well exercised, by the *only acting* Trustee, or his heirs, in case the others renounce the trust.

Hill on Trustee, 473.
Hankins v. Kemp, 3, East, 410.
Cooke v. Crawford, 13, Sim. 91.
Eaton v. Smith, 2, Bearon, 239.
See Darone v. Fanning, 2 John ch., R. 252.
Sharp v. Sharp, 2 Bam. and Old. 405.

8.

And so if a power of sale be created by will, but without declaring by whom it is to be exercised, but the proceeds of the sale are directed to be applied, or distributed by the Executor, or any other person, the Executor, or that other person, will take the power of selling by implication, unless a contrary intention appear from the Will.

Hill on Trustee, 473,
Newton v. Bennett, Brown c. c., 135.
Elton v. Harrison, 2 Sivanst. 276.
Blatch v. Wilber, 1 Atk. R., 420.
Bentham v. Whiltshire, 4 Mad. 444.
Forbes v, Peacock, 11 Suir. 152, 160.
Curtis v. Fulbrook, 8 Hane R., 28 and notes.
Forbes v. Peacock 12 Sim. R. 528, 539, 548, and cases cited at pages 537-8.
Same v. Same, 11 Mees and Wds. R. 630.
Same v. Same, 1 Phillip's R. 717.

Now this last case shows very clearly that where the Will charges the debts as legacies upon the land, or orders it to be sold for that purpose, that the power will belong by implication, to the executors, *because* the duty of paying the debts or legacies appertains to them. The power will appertain to those charged with the duty, and will consequently *survive*, or belong to the *acting* Executor, or Trustee.

The same result will follow, where the power is conferred upon the office of Executor, instead of the individual name of the Executor.

The power also *survives*, and the acting Executor may exercise it, in all cases where it is given in language to the "*survivors or survivor*," &c., and this is put upon the ground of *express intention* of the Grantor or Testator—and is so at the Common Law.

In this case, therefore, Pahlman would be entitled at Common Law, to exercise this power, as the sole *acting* Executor, by and under the express direction of the Will, because that power was given to them by name, as "my Executor and the *survivor* of them."

So that the power was not only given to the *office* of the Executor, but expressly to the *survivor*, and would survive, and might be executed at

Common Law by the sole acting Executor, even in cases of naked powers.

Clinefelter v. Ayers, 16, Ills. R., 329.

9.

But we might go even one step further, and admit that Pahlman could not exercise it alone under the circumstances in this case, by the principles of Common Law, yet the Statute of 21 Hen. 8 cap 4, would meet the case, where one renounces as here—and that Statute is in force here.

16 Ills. R. 329.

Admitting that there was no estate in the lands devised, but simply a power of sale—and still there seems no ground left to question the title here for want of a power of sale in Pahlman alone—either under the Statute of Hen. 8, or at the Common Law, and the Court must decree a specific performance by defendant.

Defendant objects to close the purchase, on the ground that the power conferred by the Will, was a naked power, uncoupled with any trust or interest in the trustee or executor, and therefore cannot be exercised by one, and that it is optionary, and no one can compel him or them to execute it.

For argument's sake, I will admit that is a naked power, without an interest in the Executor, Pahlman, but is coupled with a trust for the benefit of the creditors, for whose benefit it is in part made, and for the legatee—and for the maintenance and education of the children. It is therefore, not a naked power in the Common Law sense, requiring all the grantees to join in its execution.

First—because the very language of the Will gives it to the *survivor*, and one can, as sole *acting* Executor or Trustee, execute it as *survivor* in the sense of the testator's intention.

And second—I offer the following considerations, upon authority—

10

"If the power is one which it is the duty of the party to execute, made the duty by the regulations of the Will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the execution of the power, and

without discretion, whether he will execute it or not; and the Court adopts the principle relative to trusts, and will not permit his negligence, accident or other circumstances to disappoint the interest of those for whose benefit he is called upon to execute it.

Withers v. Yeadon, 1 Rich. Eq. R., 329, 330-1.
Brown v. Higgs, 8 Ves. Jr., 574.
Osgood v, Franklin, 2 John C. R., 21, 14, John R. 527.
Bull v. Bull, 8 Conn. R., 47.
Harrisons v. Harrisons, 2 Gratt, 10.
Dobney v. Manning, et. al., 3 Ohio 321-4.
1 Sugden on Powers, 118 and note, 120 and note, 126 and note.

A power only passed by this Will.

Doe v. Hampton, 8 Ad. and Ell. 905.
Yates v. Compton, 3 P. Wm's. R. 308.
Howell v. Barnes, Croke Car. 382.
Sugden on Powers, 130.

But we are to look to the whole Will, and if it evince a design, that at all events, the lands are to be sold in order to satisfy *the whole intent* of the Will, it is not a *naked* power, but is *coupled with a trust* and all interest.

Sugden on Powers, 134 and note 1.
Franklin v. Osgood, 14 John R. 527.

A power to sell for the payment of debts would be such a power.

Jackson v. Ferris, 15 John R. 346.
Lessee of Zeback v. Smith, 3 Binney 69.
Nelson v. Carrington, 4 Mumf. R. 332 pl. 9.
Digge's Lessee v. Jannan, 4 Harr. & McHen. 485.
Woodbridges Him. v. Watkins, 3 Bibb. 349.
11 4 Kent's Com. 326-7-8.

The case in Binney is strongly in point, in its facts, as well as decision.

So in Harris & McHenry.
Croke Car. 382.
Hardresse, 405, 419.
1 Cha. Rep. 35.

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I think those cases with the following, perfectly conclusive, when appled to this case.

2 Story Eq. Sims. Sects. 1060 to 1064, inclusive and notes.
Peter et. al. v. Berenly et. al., 10 Pet. R. 532.
Bark U. S. v. Berenly, 1 Howard U. S. R. 134.
Marsh v. Wheeler et. al., 2 Edwd—ch. R. 156.
Shilton v. Homer et. al., 5 Metcalf 465.

SCATES & RUCKER,

FOR PLAINTIFF IN ERROR.