No. 12458

Supreme Court of Illinois

Ayres

---

vs.

Clinefelter

1852 56.

Burton Ayres

vs

Fudrin Blinefelter

56

1858

12458

La Salle County Circuit Court May term AD 1855

State of Illinois } Pleas before the Honorable Edwin S.
La Salle County } LeSand, Circuit Judge in and for the
ninth Judicial District in said
State, at a term of the Circuit Court in and for said
County of La Salle in said District, begun and held at the
Court House in Ottawa in said County, on the second
Monday, the fourteenth day of May AD one thousand
eight hundred and fifty five

Present Hon. Edwin S. LeSand Judge &c
Wm H. L. Wallace States Attorney
Francis Warner Sheriff
John F. Nash Clerk

On the 5th day of November AD 1852 a declaration
in Ejectment was filed in the office of the Clerk of the
Circuit Court of said County in the words and figures
following viz:

"State of Illinois La Salle County – In the
Circuit Court for the Nov. term AD 1852
Henry Kleinfelter and Mary Kleinfelter his wife by
E. S. Kellogg their attorney complain of Burton
Ayers, for that whereas the said plaintiffs in the right
of the said Mary Kleinfelter on the first day of January
AD 1832 were possessed of one undivided ninth part
of a certain tract of land with the appurtenances
situate in said County being a part of the South
West quarter of Section fourteen Township thirty three
North of range one East of the 3d principal meridian

[1246 pd]
(1)

and bounded as follows. Commencing at a point on a line dividing Sections fourteen and fifteen of said Township nine hundred and twenty eight feet North of the South West corner of said Section fourteen, thence North seven rods and a half, thence East One hundred and sixty feet, thence South seven rods and a half (to the South East corner of Lot one Block One of Lapsley's addition to LaSalle) thence West to the place of beginning, which said premises the said plaintiffs claim in fee as the property of the said Mary Cleinpeter - And they the said plaintiffs bring to possession thereof the said Burton Ayres afterwards to wit on the first day of October AD 1832 entered into the said premises and ejected the said plaintiffs therefrom and unjustly withholds from the said plaintiffs the possession thereof to the damage of said plaintiffs of $1000, and therefore they bring suit.

2d Count - For that whereas also the said plaintiffs in right of the said Mary Cleinpeter were on the said first day of January AD 1832 possessed of an undivided eighth part of the said premises which they claim in fee as the property of the said Mary Cleinpeter and they the said plaintiffs being so possessed the said Burton Ayres afterwards to wit, on the first day of October AD 1832 entered into the said premises and ejected the said plaintiffs therefrom, and unjustly withholds from the said plaintiffs the possession thereof, to the damage of said plaintiffs of $1000, and therefore they bring suit.

E. S. Holbrook
Atty for Pltfs.

To Mr Burton Ayres

You are hereby notified that the declaration with a copy of which you are hereby served and to which copy this notice is subjoined will be filed on the fourth day of the term of the

Circuit Court of LaSalle County in November next
that upon filing the same a rule will be entered
requiring you to appear and plead to the said
declaration within twenty days after the entry of such
rule and that if you neglect so to appear and plead
a judgment by default will be entered against you
and the plaintiffs will recover possession of the premises
specified in the said declaration — Dated this 29th
day of October AD 1832 — Yours &c

E. S. Wolbach

Atty for Plffs.

State of Illinois
LaSalle County } E. S. Wolbach being duly sworn
deposes & says that on the 29th day of
Oct. 1832 he gave a copy of this declaration & notice
to Mrs C. Ayers a white person above the age of ten
years a member of the family of said defendant at his
dwelling place on said premises that said defendant
as he was informed & believes was absent from home

E. S. Wolbach

Subscribed & sworn to before me
this 5th day of Nov. AD 1832
P. Lindley Clerk"

On the 23d day of November 1832 the defendant
filed his plea to plaintiffs declaration in the words and
figures following to wit:

"State of Illinois LaSalle County
} Circuit Court thereof vacation after November term AD
1832 — Burton Ayers & Henry Weinfetter & Mary
Weinfetter his wife — Ejectment — And now comes the
said defendant by Wallace his attorney, and defends
the force and injury when &c and says he the said
defendant is not guilty of unlawfully withholding the

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(3)

(4) said premises in said plaintiffs declaration mentioned and described as the said plaintiffs have in their said declaration thereof above alleged against him — and of this the said defendant puts himself upon the Country &c.

W. H. L. Wallace
Atty for Defts."

"& the plaintiffs do the like
by E. S. Holbrook"

On the 9th day of June AD 1855 a certified copy of the judgment in the Supreme Court in the above entitled cause was filed in the office of the Clerk of the Circuit Court in words and figures following viz:

At a Supreme Court began and holden at Ottawa, on Monday the 4th day of June in the year of our Lord one thousand eight hundred and fifty four within and for the third Grand Division of the State of Illinois

Present the Honorable Samuel H. Treat Chief justice
" " " John D. Caton Associate justice
" " " Walter B. Scates " "

Vacation after June term AD 1854 — April 24, 1855

Henry Weinfelter et al
vs
Burton Ayers

Error to LaSalle

On this day came again the said parties, and the Court having diligently examined and inspected, as well the Record and proceedings aforesaid, as the matters and things

therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is manifest Error. Therefor it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the judgment of the Circuit Court in this behalf rendered be reversed annulled, set aside, and wholly for nothing esteemed and that this cause be remanded to the Circuit Court for such other and further proceedings as to law and justice shall appertain. And it is further considered by the Court that the said plaintiffs in error recover of and from the said defendants in error their costs by them in this behalf expended and that they have execution therefor.

I Lorenzo Leland Clerk of the Supreme Court of the State of Illinois do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the case entitled cause of record in my office

In Testimony Whereof I have set my hand and affixed the Seal of the said Supreme Court at Ottawa this 8th day of June in the year of our Lord one thousand eight hundred and fifty five

L. L. Leland
Clerk of the Supreme Court

And afterwards to wit: on said 9th day of June last aforesaid the same being term of the days of the May term of the LaSalle County Circuit Court for the year A.D. 1855 the following order was made

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(5)

and entered of record in said cause to wit:

"Henry Kleinfelter }
Mary Kleinfelter }
vs } Ejectment
Burton Ayres } This day the plaintiff comes by E. S. Holbrook his attorney who suggests the death of Mary Kleinfelter and on his motion it is ordered by the Court that he have leave to amend his declaration herein on or before the first day of July next."

On the 29th day of June AD 1855 the plaintiff filed his amended declaration in the words and figures following, viz:

"State of Illinois La Salle County — In the Circuit Court thereof vacation after the May term AD 1855.

The Declaration of Frederick Kleinfelter filed by leave of the Court by way of amendment to the original declaration in suit in Ejectment in said Court entitled Henry Kleinfelter & Mary Kleinfelter his wife vs Burton Ayres — said Mary Kleinfelter having deceased and said Frederick Kleinfelter being the son & heir at law of said Henry & Mary Kleinfelter — And now comes the said Frederick Kleinfelter by E. S. Holbrook his attorney and by leave of the Court first obtained and according to the Statutes in such case provided, the death of the plaintiff Mary Kleinfelter having been suggested substitutes his own name as plaintiff in the place of said Henry & Mary Kleinfelter as the son of said Mary Kleinfelter & heir at law of one half of the real estate of which said Mary

Kleinfelter died seized and as such heir becomes to the title of said plaintiff as to an undivided ⅛th thereof of the premises described in the original declaration filed in said cause & the record evidences thereof By E. S. McElwee his Atty."

On the 11th day of February AD 1857 an agreed state of facts in the above entitled cause was filed in said Clerks office, and is in the words and figures following, that is to say:

"LaSalle Circuit Circuit Court February Special term 1857 = Friedrich Kleinfelter vs Barton Ayres = Ejectment = It is hereby agreed by and between the parties to this suit for the purpose of this trial and this trial only

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

2d = It is admitted by said defendant that said Friedrich Kleinfelter is one of the heirs at law of said Samuel Lapsley deceased and as such had the said Lapsley died intestate would have been entitled to an equal undivided forty eighth part of said premises by descent and said defendant also admits that he was in possession of the said premises claiming title thereto at the time of the service of the writ of this declaration and notice in said cause

3d = It is admitted by said plaintiff that said Samuel Lapsley prior to his death and while in a

[illegible]

(7)

sound and disposing mind and memory Executed, published and declared the said will, a copy of which is hereto attached marked "A" and made a part of this agreement as his last will & testament that he never afterwards made any other will and never in any manner altered or changed said will

4th - That said will was duly proven and recorded according to law in the Office of the Probate Justice of the Peace of LaSalle County on the 28th day of June 1839.

5 - That the said Burton Ayres who is defendant in this suit and William Waddingham two of the persons named as Executors in said will, never took out letters testamentary; and that letters testamentary were issued thereon to the said John Fanghauser the other person named in said will as Executor by said Probate Justice as Executor of said will, a copy of which letters are hereto attached marked "B" and made a part of this agreement; and that said Fanghauser was qualified as such Executor, and that Ayres & Waddingham were both also at the time of the issuing of said letters to said Fanghauser and at the time of the conveyance by said Fanghauser hereinafter stated, and that the said Ayres and Waddingham were in no wise legally disqualified from acting as Executors of said will.

6th That on or about the 2d day of October 1841 and after said Fanghauser had been qualified and while he held the office of Executor as aforesaid he as such Executor executed, acknowledged and delivered to John Swanson and Mary Swanson the deed a copy of which is hereto attached marked "C" and made a part of this agreement and that

afterwards some time in the year 1846 said John and Mary Swenson duly conveyed by deed to said Burton Ayres whatever title they obtained to said premises by virtue of said deed by Faughender to them — E. S. Holbrook attorney for plaintiffs"
W. H. L. Wallace Atty for Deft."

"To all whom these presents shall come or may come Greeting: Know ye that we having inspected the records and proceedings remaining in the office of the Clerk of the County Court of our County of LaSalle do find there certain records in the words and figures following to wit:

" June 28th AD 1839

"In the matter of proving the last will and testament of Samuel Lapsley dec'd. This day came George Leland and Adam Gunn two credible witnesses to testify of and concerning the execution and validity of the last will and testament of Samuel Lapsley deceased filed in this office, the said witnesses having been by me sworn testified of and concerning the execution and validity of said will and the same having been duly proven on this 2d day of July 1839 is admitted to record, and is in the words and figures following to wit:

Will

"A" "I Samuel Lapsley of the County of LaSalle & State of Illinois, do make and publish this my last will and testament, hereby revoking & making void all prior wills by me at any time heretofore made first = I direct that all my debts and funeral expenses be paid as soon after my decease as possible out of the first moneys that shall come into the hands of my

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(9)

(10)

Executors, from any portion of my estate real or personal

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

Also I give and bequeath unto Julius C. Orr the sum of one thousand dollars as well for the respect which I bear towards him as for his Kindness and attention to me during sickness

Also I give and bequeath to Martha Steinfelter Margaret Steinfelter, Finderin Steinfelter, Elgin J. Steinfelter and Lucinda Steinfelter children of my sister Mary Steinfelter the sum of One thousand dollars each to be paid to them respectively, at their respective ages of twenty one years, or days of Marriage which shall first happen, the same to be put out to interest at the discretion of my executors, and the interest accruing thereby to be applied to their education and maintenance respectively, until their said respective ages or marriages and if either of them shall die before the age of twenty one years, or marriage, then I give the share of the one so dying unto the survivors of them. Also I desire my Executors to sell and dispose of as soon as may be after

my decease, all my personal property for good current money, and that all the real estate of which I shall die seized or possessed shall be sold by my Executors at any time when they may think proper for its reasonable value for like current money, or on such credit as they may think proper, and the amount thereof secured in such manner as is usual in like cases to insure the full and punctual payment thereof, and to effectuate this my intention I do hereby vest in my executors full power and authority to dispose of my real estate in fee simple or for a term of years, or otherwise as full and large a manner in every respect as I could myself do if living.

And I do hereby make and ordain my friends Burton Ayres, John Vaughander and William Waddingham Executors of this my last will and testament.

In Witness Whereof I Samuel Lapsley the testator have to this my will, written on one sheet of paper set my hand and seal this twenty 24th day of March in the year of our Lord Eighteen hundred and thirty nine signed published and declared by the above named Samuel Lapsley as for his last will and testament in presence of us, who at his request have signed as Witnesses to the same (the words "julia Ann Vaughander" were interlined before signing) Samuel Lapsley his mark

Lorenzo Leland of Ottawa
Dann Gunn

Proof

State of Illinois } On this 2d day of July AD 1839 before me
La Salle County } John V. A. Ives Probate justice of the peace in for said County appeared

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(11)

Lorenzo LeSand and Adam Gumm the subscribing witnesses whose being by me duly sworn, depose and say that they were present and saw Samuel Lapsley sign the within will in their presence, and that he the said Samuel Lapsley acknowledged the same to be his act and deed that they believe the said testator Samuel Lapsley to be of sound mind and memory at the time of the execution of the within will by him

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

Lorenzo LeSand
Adam Gumm

John V. A. Kerr P.M. State Justice &c

September 6th 1839

John Langhamder Executor of the last will & testament of Samuel Lapsley dec'd } Application for Letters

This day came the said John Langhamder one of the Executors named in the will of the said Samuel Lapsley deceased here to fore proven and admitted to record, and made application for Letters Testamentary, It appearing that the said Lapsley is dead, that the other persons named in said will as Executors declined acting, and that the said applicant is entitled to letters as sole executor of said will, and the said applicant having filed in this office the requisite bond with satisfactory security, Letters Testamentary are therefore granted to the said John Langhamder,

Letters

"B" State of Illinois } The People of the State of Illinois to all La Salle County } to whom these presents shall come

Greeting,

Know ye that whereas Samuel Lapsley late of the

County of LaSalle and State of Illinois, died on or about the nineteenth day of June A.D. 1839 as he is said, after having duly made and published his last will and testament a copy of which 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 Fauquander has been appointed Executor in and by said last will and testament to execute the same, and it is ordered that the said property may be granted 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 Fauquander as such executor to collect and secure all and singular the goods and chattels rights and credits which were of the said Samuel Copley deceased at the time of his decease, in whosoever hands or possession the same may be found in this State and well and truly to fulfill & perform all such duties as may be enjoined upon him by the said will, so far as there shall be property, and the law charge him, and in general to do and perform all other acts which now are or hereafter may be required of him by law.

Witness John B. A. Vors Probate justice of the peace of the said County of LaSalle at his office in Ottawa this sixth day of September in the year of our Lord 1839

John B. A. Vors Probate justice of the peace [L.S.]

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

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(13)

(14) In Testimony Whereof I Samuel W. Raymond Clerk of the County Court of said County have hereunto set my hand and affixed the seal of said Court at Ottawa this 28th day of December AD 1853

Seal

S. W. Raymond Clerk

Copy of deed from John Vanghander Executor of Samuel Lapsley deceased to John Swanson

"6" This Indenture made the second day of October One thousand eight hundred and forty one between John Vanghander Executor of the last will and testament of Samuel Lapsley deceased of the County of Lasalle and John Swanson and Mary Swanson late of the County of Bathurst of the second part witnesseth that the said party of the first part in consideration of the sum of fifteen hundred dollars to him duly paid hath sold and by these presents doth grant and convey to the said parties of the second part all that certain tract or parcel of land situate in the County of Lasalle and State of Illinois to wit: the West half of the South West quarter of section fourteen (14) in Township thirty three (33) North range one (1) East of the third principal meridian, excepting and reserving therefrom that portion of said quarter section laid out into town lots for said Samuel Lapsley deceased by Jas. H. Rees Surveyor reference being had to a plat of said town now in possession of the party of the first part will more fully appear. Also the equal undivided half of South West quarter section fourteen (14) in said Township thirty three (33) North range one (1) East of the said third (3d) principal

meridian with the appurtenances and all the estate title and interest of the said party of the first part therein heirs. And the said John Langhanden as executor as aforesaid doth hereby covenant and agree that at the delivery thereof he as executor &c is the lawful owner of the premises above granted and seized of a good and indefeasable estate of inheritance therein clear of all incumbrances and that he as executor &c warrant and defend the above granted premises in the quiet and peaceable possession of the said parties of the second part their heirs and assigns forever. In Witness whereof the said party of the first part hereunto set his hand and seal the day and year first above written.

Sealed and delivered in the presence of — In 19th line from top the words "North West" also in 24 from top the words "he &c is" also 27 as executor &c interlined before signing

John Langhanden (Seal)
Executor of the last will and Testament of Samuel Lapsley deceased

H. Leonard

State of Illinois } This day before me the undersigned
LaSalle County ss } Henry Leonard a Justice of the
peace in and for said County
personally appeared John Langhanden to me personally
known as the real person who executed the annexed
deed and acknowledged that he executed the same
as his voluntary act and deed, for the uses and purposes
therein contained.

Given under my hand and seal this 2d day of
October AD 1841 H. Leonard J. P. (Seal)

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(15.)

Filed Oct 4. 1841

And afterwards to wit: on Thursday February 12th 1857 the same being one of the days of the February Special term of said Court for the year 1857 the following order was entered of record in said cause to wit:

"Finderen Steinfelter
vs
Burton Ayres
Ejectment
This day comes the plaintiff by E. S. Caldwell his attorney and the defendants by Dickey & Wallace his attorneys and by agreement of parties a jury is waived and this cause submitted to the Court for trial, and after hearing the evidence and a part of the arguments of counsel the further hearing of this cause is postponed until the coming in of the Court to-morrow morning"

And again on the 16th day of February 1857 the same being one of the days of said February Special term another order was entered of record in said cause in the words and figures following, that is to say:

"Finderen Steinfelter
vs
Burton Ayres
Ejectment
This day again come the parties hereto by their attorneys, and the Court after hearing the balance of the arguments of counsel, and their deliberation being thereupon had the Court find the issues herein for the plaintiff and that the plaintiff is entitled to the possession of the premises set forth and described in his declaration

The defendants counsel now move the Court for a new trial, which motion is overruled by the Court

Defendants Counsel also move the Court in arrest of judgment, which latter motion is overruled by the Court.

It is therefore considered by the Court that the plaintiff have and recover of the defendant the possession of the premises set forth in his declaration viz: "One undivided forty eighth part of a certain tract of land with the appurtenances situate in said County being a part of the North West quarter of section fourteen Township thirty three North of range one East of the third principal meridian and bounded as follows: Commencing at a point on a line dividing sections fourteen and fifteen of said Township nine hundred and ninety eight feet North of the South West corner of said section fourteen thence North seven rods and a half, thence East three hundred and sixty feet, thence South seven rods and a half (to the North East corner of Lot one Block two of Lapsleys addition to Sadalia) thence West to the place of beginning, and that he have a writ of possession thereon. Also that the plaintiff have and recover of the defendant his costs and charges by him herein expended and that he have execution therefor.

The defendants Counsel now move the Court for an appeal herein to the Supreme Court, which is granted upon condition that the defendant within forty days from this date execute a bond payable to the plaintiff in the sum of One hundred Dollars with Adam Wroman as his security."

And on the 19th day of February 1857 the same being one of the days of said February Term of said Court for the year 1857 a final order was entered of record in said cause in the words and figures following that is to say

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(17)

(18)

"Findrew Bleinfetter

vs

Burton Ayres

Ejectment

By agreement of parties

it is ordered by the Court that the Court herein stair until the first Wednesday after the first Monday in March next to file a Bill of Exceptions and to complete the Appeal granted in this cause".

Afterwards on the 5th day of March AD 1837 the defendant filed his Bill of Exceptions in the words and figures following viz.

"State of Illinois LaSalle County Circuit Court thereof — February Special Term 1837

Findrew Bleinfetter

vs

Burton Ayres

Ejectment

Be it remembered that on this 12th day of February AD 1837 the same being one of the days of the February Special Term of said Court in the year aforesaid this cause came on to be tried before the Honorable Madison E. Kellester Judge of said Court a jury being waived by agreement of the parties — and the plaintiff to maintain the issue on his part gave in evidence an agreed State of facts, which agreed State of facts was as follows (See agreed State of facts above)

The plaintiff here rested his case —

The defendant then offered in evidence the will of Samuel Lapsley deceased and the probate thereof, which is set out in the agreed State of facts above set forth and which was read without objection.

The defendant then called Samuel B. Raymond a witness who being duly sworn testified that he was the County Clerk of said County and Keeper of the books and records of the Probate Office of said County. A book was here shown the witness Raymond, which he testified was the record book or book of entries of the doings of the probate justice of said County for the year 1839— The defendant then offered in evidence a certain order or entry in said book which order or entry was in the words and figures following (to wit)

(See order of September 6. 1839 set out in agreed state of facts above)

The plaintiff by his counsel objected to the admission of said order in evidence but the Court permitted the same to be read in evidence subject to the future action of the Court, to either admit or exclude the same upon consideration of the whole case. The defendant then offered in evidence a bond, after proving by said witness Raymond that the said bond was the bond given by said John Haughlander as executor of the will of Samuel Copley deceased which bond was in the words and figures following

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The defendants then called John V. A. Vors as a witness who being duly sworn testified that he was probate justice of the peace of said County during the year 1839 - and that the entry in the record book or book of entries dated Sept 6, 1839 about which suit was in his (witnesses) hand writing - a written memorandum, which had ~~been~~ previously been sworn to by the witness Raymond & K on file in said probate office among the papers relating to the estate of said Lapsley, was here shown to the witness Vors, which written memorandum is in the words and figures following that is to say;

"Letters testamentary — Off of said
with letters refused
" other executors named in will ~~fail~~ to
" qualify
" John Feenghauser the executor
" ~~Hezekiah Linsley~~
" Zachariah Merritt }
" David Dimmick } Appraisers"
" Michael Leonard }
Endorsed " mem — Sept 6, 1839"

The witness Vors after examining the above written memorandum testified that the same was in his hand writing - he also testified that the will of Lapsley on file in the probate office was endorsed in his hand writing - also the affidavit attached thereto - He also testified that he was acquainted with Benton Ayres and John Feenghauser. The witness Vors also testified that it was his best impression that Benton Ayres and William Waddingham did refuse to qualify as executors of Lapsleys will - that such was his best recollection gathered from the papers

Know all men by these presents that we John Gaughander Justin Dewey and Joseph Worsley and Thomas Boardman of the County of LaSalle and State of Illinois are held and firmly bound unto the people of the State of Illinois in the penal sum of Twelve Thousand Dollars current money of the United States which payment well and truly to be paid and performed we and each of us bind ourselves our heirs executors or administrators jointly severally and firmly by these presents.
Witness our hands and seals this 14th day of August A. D. 1839

The condition of the above obligation is such that if the above bound John Gaughander Executor of the last will and testament of Samuel Lapsley deceased do make or cause to be made a true and perfect inventory of all and singular the goods and chattels rights and credits and tenements and hereditaments and rents and profits arising of the same of the said deceased which have or shall come to the hands possession or knowledge of the said John Gaughander or into the possession of any other person for him and the same

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so made do exhibit in the Court of probate for the County of LaSalle as required by law and also make and render a fair and just account of his actings and doings as such executor to said Court when thereunto lawfully required and will and truly fulfilled the duties enjoined upon him in by the said will and shall moreover pay and deliver to the persons entitled thereto all the legacies and bequest contained in said will so far as the estate of the said testator will thereunto extended according to the value thereof and as the law shall charge him and shall in general do all other acts which may from time to time be required of him by law then this obligation to be void otherwise to remain in full force and virtue

Signed sealed and delivered in the presence of F. A. Horsley
Pliny Dewey
Benj Burnham

John Gangham dec (Seal)
Justin Dewey (Seal)
Joseph Horsley (Seal)
Thomas Burnham (Seal)

(19.)

and memoranda made by himself at the time and from his general recollection of the transaction, and of what occurred before the letters were issued to Frenghauder — The defendants Counsel then asked the witness Hoes to to State what was the ordinary course of business in the probate office in 1839, as to whether the record book was made up immediately on the transpiring of the action of the probate justice or subsequently — and if subsequently what means were usually used to preserve a history of the transaction? — and asked the witness to state fully the ordinary course of business in that respect — The plaintiff by his Counsel objected to the foregoing question but the Court permitted the same to be asked and the testimony to come in subject to be subsequently excluded by the Court on full consideration.

In reply to the foregoing question the witness Hoes testified that the general practice in the probate office at that time (in 1839) was when Executors or administrators or others appeared before the probate justice to transact business to take down the papers on file in that particular estate and ascertain what was to be done and make a memorandum of it, and place the memorandum among the papers on file in the estate, with a date on the memorandum so as to show at what time the business was done. The memorandum with the files were then tied together in a bundle and laid away for the purpose of being entered on the record at leisure and they were so entered according to their dates. The memoranda were generally stuck in among the papers pertaining to the estate in which the business had been done —

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(21)

this paper (the memorandum above set out) was such a memorandum of what was done in the matter of the estate of Samuel Lapsley on the 6th day of Sept 1839 — The defendant then offered the memorandum referred to by the witness Hoes and above set out, in evidence, the plaintiff by his counsel objected to the same being received in evidence, and the Court sustained the objection and excluded said memorandum, to which decision of the Court in sustaining said objection and excluding said memorandum the defendant by his counsel then and there excepted.

The witness Hoes also testified that his recollection was that the personal estate of said Lapsley was insufficient to pay the debts of the estate and the legacies The inventory of said estate, which was first proven by the witness Raymond to be the inventory of said estate was here shown to the witness Hoes which inventory was in the words and figures following;

and the witness Hoes after examining the said inventory testified that the words "good" "desperate" & "doubtfull" in the margin of said Inventory were in his hand writing. He also testified that

Inventory of Debts due the Estate of Samuel Lapsley Decd

	Julius C Cox	(Note) in sale	302	" "	good
	John Cody	a/c	4	" "	Doubtful
	Wm Richardson	" —	8	" "	supposed to be collectable
	Fleming Walsh	"	18	88	Do
collected	Daniel Beard	" collected	2	" "	Do
	Daniel Casgriff	"	41	50	Doubtful
	Wallace	"	14	40	Do
collected	Adam Crossman	a/c collected	12	50	good
	Joel Greeley	Note	5	00	Doubtful
	James Hayes	a/c —	5	00	Desperate
	A. C. Watley	" —	5	00	Do
	James Steward	" —	1	25	Do
	John Cook	" —	8	75	good
	A & J OConnor	"	2	50	Do
Paid	Jos Webb	"		38	Do
	Wm Boyne	"	8	25	Desperate
	Canal Section No 195	a/c —	65	" "	Do
paid	Benjn Cross	" collected	1	64	good
	Spalding & Kinney	" Balden		50	Desperate
	W Spalding	"	—	—	Do
	N. C. Phillips	a/c	36	06	"
	Kinney & McMartin	"	543	93	"
	H. S. Kinney & Co	"	1073	77	"
	W. L. Kinney	"	13	75	"
	Henry Carrant	"	7	50	"
	W. W. Merritt	"		86	"

(23.)

[12458-13]

(24.)

Amt Brot Forward	2182	42	
Wm A. Baldwin a/c	3	50	Good
Danl Stephens " "	16	19	Doubtful
David Smith Note (run away)	28	22	"
Judgement in Co Court of LaSalle Co vs Roger Skinner Decd			Doubtful
Judgement in do vs State Al	100	00	Good in part
James Rogers Cash lent	100	00	Doubtful
Thomas McHinnesy a/c	191	89	supposed to be collected
Amt Recd from Executors sale	122	" "	
Judgement against Rogers Skinner and Samuel Smith	26	11	Doubtful
Ulysses Spalding —	1007	" "	Do

Real Estate

Deed from A. G. S Wight Dated Jany 21st 1836 for 370 acres of land
Also North west quarter of Section 14 T33 - R 1 east of 3d P.M.
South west quarter same section (in dispute)

John Vaughanden
Executor

John Faughander did pay me the debts of said estate to his knowledge.

On cross examination by the plaintiffs counsel the witness Cox testified that he derived his impression that Agnes and Waddingham refused to qualify as executors from the papers and from his general recollection of the transaction and his (witnesses) course of doing business as Probate Justice that he may have been informed by Benton Agnes at the time that he - that he could not say that he knew Waddingham - that he (witness) had reliable information of Agnes and Waddingham's refusal to act as executors, at the time he (witness) issued letters to Faughander, but that he could not say now how he derived such information -

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

The Defendant then called Phil Lindley as a witness, who being sworn, testified that he knew Samuel Lapsley, Benton Agnes, John Faughander and had been William Waddingham. After Lapsleys death witness was talking with Benton Agnes about serving as executor of Lapsleys will and witness told Agnes that he (witness) thought that Agnes ought to qualify as Executor - Agnes replied

$12458-14]
(25)

to witness that Lapsleys business was so mixed up that Lapsley himself knew nothing about it, and he (Agnes) would not have any thing to do with it— Witness could not distinctly recollect whether this was in 1839 or in 1840. Said it was in one of those years, and he thought after letters had issued to Faughender— that he supposed they (witness & Agnes) had a dozen conversations on the subject and witness never heard Agnes express any other or different opinion or determination than that he would not serve as executor— Waddingham lived in St Louis and witness had no recollection of ever having heard him say anything on the subject—

Wm Sindley further testified that he was well acquainted in the neighborhood where Lapsley lived and died ever since 1836— The defendants counsel then asked the witness Sindley whether there was any general rumor in that neighborhood as to whether Agnes and Waddingham refused to qualify as executors of Lapsleys will? The plaintiffs Counsel objected to the question and the Court sustained the objection, to which decision of the Court in sustaining said objection the defendants by his Counsel then and there excepted.

On Cross examination the witness Sindley, testified that Waddingham was engaged in packing pork and had something to do with a brick yard in St Louis He married Lapsleys sister— so the witness learned from both Waddingham & Lapsley— Mrs Steinfelter wife of Henry Steinfelter was a sister of Lapsleys— Finderen Steinfelter (" we called him Fin") was a son of Mrs Steinfelter—

The defendants then called Lorenzo D Sand as a

witness, who being duly sworn, testified that in 1839 he resided in Ottawa and practiced law there - that he was acquainted with Samuel Lapsley, who then lived near Peru - he was also acquainted with Farnsworth and Ayres, but did not remember Waddingham - he did some business at Ottawa for Farnsworth - Lapsleys will is in witnesses hand writing - he drew it and was one of the subscribing witnesses - the will was written at Lapsleys house during his last sickness - thinks he acted as attorney for Farnsworth as executor - thinks Ayres was there at Lapsleys house when the will was drawn, but is not certain, that his (witnesses) impression is that there was not sufficient of Lapsleys personal property to pay his debts - that he (witness) had been attorney for Lapsley for three or four years before his death, and got his impression about Lapsleys personal property and debts from Lapsley himself and from what he (witness) knew of the condition of the estate afterwards - was acquainted with many of the persons against whom Lapsley had claims - Byron was sometimes good but generally bad - Kinney & Spalding, E. L. Kinney & Co, Kinney & Martin were insolvent - a judgment against the State of Illinois for $1011, was worth very little - a debt of $10000, against Thomas Spalding in 1840 & for some years afterwards was not worth anything -

On Cross examination the witness stated testified that Spalding was not worth anything in 1840 - witness issued executions and the bills against him which were returned no property found - that he (witness) got his information as to the condition of Lapsleys personal property and debts from Lapsley himself - witness was certain that there was not sufficient personal estate to

[12459-15]

(27)

(28)

pay the debts and legacies – witness thought that Agnes knew that he was to be one of the executors when the will was drawn –

The witness Raymond was then recalled and testified that the papers shown to him were the files in the probate office of papers pertaining to the estate of Samuel Lapsley – The defendants then offered in evidence the following papers taken from said files to wit:

1st The Inventory of the estate of Samuel Lapsley, a copy of which is above set out in connection with the testimony of the witness Ford.

2nd – The Appraisement bill of said estate which was in the words and figures following:

~~(The Inventory above set out is the thing there appertaining to the matter of an Inventory and Appraisement bill)~~

3d An account current rendered to the probate Court in 1847 by John Langhanden as executor of said estate, which account was in the words and figures following

The following is a list of the valuation of property belonging ~~to~~ to the Estate of the late Samuel Lapsley deceased a resident of Lasalle County, Ill.

The meadow with the fence Surrounding it including the buildings within it	$230.00 Cents
The fruit trees within the above mentioned meadow three apple trees, two cherry trees and one Bunch of Current Bushes excepted	25.00
Rails round the potato ground at three dollars per hundred Amounting to thirteen hundred "	39.00
One Waggon Shop	20,00
One Log Stable	10,00
One Spring House	4,00
Two Log Chains	5,50
Two Beggs and one Jon plane	1,50
Three Corn Hoes	1.00
Two Sugar Boxes ~~one~~ augers & one chisel	.75
Four bed blankets	3,50
Two Coats	6.00
One Spade & one hoe	0,50
Two Candlesticks one pair of tongs one bit, one pitcher, one Slate and one powder horn	1,50
One empty Barrel	0,25
One two inch auger & one Ladder	1,50
One bar of iron one trammel & ~~an~~ a trammel chain	3,50
	$353.50

Lasalle October 1st 1839

} appraisers

[12458-16]

We do hereby certify, that the within is a true bill of appraisement of the property within described belonging to the Estate of Samuel Lapsley deceased as witness our hands & Seals this 1st day of October 1839

Daniel Dennick (Seal)
Michael Leonard (Seal) } appraisers
Hackaliah Merritt (Seal)

Endorsed, "Filed March 23d 1840
"approved.
"J. V. A. Hoes
"P. J. P

John Gaughenbaugh Executor of the Estate of Samuel Lapsley deceased in account with said Estate to wit the said Executor charge himself with all Money received in favor of said Estate and credits himself with all Money paid out by him which is as follows to wit

1865 To Amount of Sale of P. property $420.00
" " received from the sale of R. Estate
Sold to John Swenson $1500.00
To cash received from Sale of Corn &c 273 00
$2193.00
" " Collected from Inventory on file 20 02
" " Rec'd from Sale of Canal Scrip one hundred thirty one dollars sold for 38 cents on the dollar 36 68
$2249.70

1866 by Cash paid Benjamin Bears Jun. R. 50.00
" " " James Campbell Jun. R. 8.30
" " " Sarlin & Coe " " 8.25
" " " L. Selena Clark " 1.00
" " " Orth & Stafford " " 1.25
" " " Wm. J. Coe " " 10.00
" " " James Cunningham " " 7.00
" " " Daniel Dimick " " 2.75
" " " L. L. Mead " " 10.00
" " " J. L. Dickey " " 10.00
" " " Davis & Sears " " 8.00

(36)

By Cash paid	Wm Redelick as sheriff	8 50 00
" " "	John Swanson	20 00
" " "	Joel D Armstrong	19 50
" " "	William Redelick collector	14 00
" " "	John Shultz per R.	2 00
" " "	Collins & Coe " "	30 00
" " "	James Cunningham	73 00
" " "	Wm Redelick Sheriff	210 00
" " "	Daniel Demick P.R.	47 50
" " "	Michael Seward	27 50
" " "	H A Chavonick	14 00
" " "	W. B. Coe	110 00
" " "	J. S. Quigley per R.	10 00
" " "	Carpin Lindey on note	101 00
" " "	L. R. Woodruff per James Campbell per Receipt	75 00
" " "	Weaver & Close	37 50
" " "	Dickey & Leland	5 00
" " "	L Leland	10 00
" " "	John Glod	17 50
" " "	Hackalah Merritt	7 50
" " "	W J Coe per R.	13 00
" " "	H Wood " "	36 43
" " "	J O A Cass " "	20 00
" " "	H Hurlbut Records	7 50
" " "	Denis Manning	20 00
" " "	A. Peters per R.	13 00
" " "	H. S. Buba "	3 00
" " "	Samuel J Quigley	13 00

By amt paid	John Rutom " "	3.35
" " "	S. Leland clerk	1.75
" " "	Wm Reddick	2.81
" " "	Geo W Norris	5.00
" " "	L Leland "	5.00
" " "	James Cunningham	20.00
" " "	J Campbell per Leonard	5.00
" " "	W Merrott	8.50
" " "	S Leland per R.	171.13
" " "	J O Cunningham	10.00
" " "	Julius W Leal " "	10.00
To John Faughander on note		103 66
" " " as percentage and other expences as pro bill on file shows		118 60
To probate Justices fees Laskin		8 51
" as counsel fees		3.00
		$1438.81

Recapitulation

Dr Estate	2249.70	
Credit	14 38 81	
	$810.89	amt Ballance

Balance in the hands of executor up to this time the Executor has been allowed his percentage & other expences up to this date he reports that the .B. of the Inventory on file of the notes and accounts can not be collected to the best of his knowledge

John Faughander Executor

4th An entry in the record book or book of entries of the probate Court in 1817 approving of the accounts rendered which entry is as follows—

[12458-19]

In the Matter of } May Ter 13th 1847
Samuel Lapsley }
deceased } Account Current

This day comes John Gamble under Execution of the Estate of Samuel Lapsley deceased and Exhibited an account Current of his Executorship of said Estate which after being Examined was approved of and placed on file and is as follows to wit

	Dr $	cts
To Amt of Sale Bill of property	420	00
" " Real Estate Sold	1500	00
" " received from Sale of Town lots	273	00
" " Collected from Inventory on file	20	62
" " Received for personal Servs	36	08
	$2249	70

	Cr Dollars	Cents
By Cash paid B Bass P.R.	50	00
" " " James Campbell	8	50
" " " J. L. Lee for R.	8	25
" " " D. Leland Clerk.	1	00
" " " Wells & Guilford P.R.	1	25
" " " Pro. J. Lee for R	10	00
" " " Jd Cunningham	73	00
" " " Danl Dewick	2	75
" " " D Leland	10	00
" " " G. L. Dickey P.R.	10	00
" " " Davis & Sears	8	00

(35) 21458-20

(36)

By cash paid Wm Reddick as Sheriff	85	00
" " " John Swanson	2	00
" " " J. M. Armstrong	1	93
	$271	68
By cash paid Wm Reddick Collector of Taxes	16	40
" " " John Shutts P. R.	2	00
" " " Julius C. Cox " "	50	00
" " " Pat Cumming ham P. R.	75	00
" " " William Reddick Sheriff	210	00
" " " Daniel Derrick P. R.	4	75
" " " Michael Leonard	2	75
" " " C. J. Chwick	1	40
" " " Wm J. Cox P. R.	10	00
" " " S. Quigley P. R.	10	00
" " " H. Lindley " "	101	00
" " " L. R. Woodruff per Samuel Campbell	75	00
By amt paid Warner & Heise P. R.	2	75
" " " Dickey & Leland " "	5	00
" " " L. Leland per R.	10	00
" " " John Flood " "	1	75
" " " H. Merritt " "		75
" " " Wm E. Cox " "	15	00
" " " H. Wood " "	54	43
" " " P. V. A. Heasi per R.	20	00
" " " H. Hurlburt Recorder		75
" " " Denis Manning per R.	2	00
" " " O. Peters P. R.	15	00

By cash paid W. S. Berbia per R	5	00
" " " Samuel Quigley " "	15	00
" " " John Rickard " "	3	35
" " " S. Leland clerk " "	1	75
" " " Wm Reddick " "	2	81
" " " Geo C Norris " "	5	00
" " " S Leland " "	5	00
" " " J Cunningham " "	20	00
" " " C Campbell " "	0	00
per C Leland per R.	5	00
By cash paid C Merritt " "	8	50
" " " S Leland " "	171	13
" " " Jas Cunningham " "	10	00
" " " Sikins & Co " "	11	00
by Executor on Note	103	16
" " percentage & other Expenses as per bill on file shows	118	46
By Probate fees	8	34
" Counsel fees	3	00
Credits	$14 38,	81

Recapitulation

Dr Estate $2249.70

Cr as P. Rts $143881

$810,89

Balance in the hands of the Executor up to this date amounts in the sum of $810.89 cents the Executor has been allowed his percentage and

(37) [12458-01]

(38)

other Expences up to this date he reports that the Balance of the Inventory on file of the Notes and accounts can not be collected to the best of his knowledge

May the 12th A.D. 1847

John Fargo Executor
of Samuel Lafferty deceased

Attest
Thomas Larkin
P. J. P.

The defendant then offered to read in evidence the following deposition of John Faughander, to which the plaintiffs counsel objected on the ground that the witness Faughander was interested in the event of the suit — but the Court overruled said objection because no exception was taken to said deposition before trial — said deposition was then read subject to be either considered or rejected by the Court upon full consideration — said deposition was in the words and figures following, that is to say:

"The deposition of John Faughander of the County of Warrick and State of Indiana a witness of lawful age produced sworn and examined upon his corporal oath on the Sixth day of October in the year of our Lord one thousand eight hundred and fifty four at the office of John B. Handy in the town of Newburgh in the County of Warrick and State aforesaid, by me John B. Handy a Commissioner duly appointed by a dedimus potestatem or commission issued out of the Clerks office of the Circuit Court of LaSalle County in the State of Illinois, bearing date in the name of John F. Nash Esq Clerk of said Circuit Court with the seal of said Court affixed thereto and to me directed as such Commissioner for the examination of the said John Faughander, a witness in a certain suit and matter in controversy now pending and undetermined in the said Circuit Court wherein Findrew Steinfelter is plaintiff and Burton Ayres is defendant on behalf of the said Burton Ayres, as well upon the cross interrogatories of the said plaintiff Findrew Steinfelter as on the interrogatories of the defendant which were inclosed with said Commission, and upon none other. The said John Faughander being first duly sworn by me

as a witness in said cause, previous to the commencement of his examination, to testify the truth as well on the part of the plaintiff, as the defendant, in relation to the matters in controversy between the said ~~plaintiff~~ plaintiff and defendant so far as he should be interrogated — testified and deposed as follows

Interrogatory first = What is your age, occupation and place of residence?

Answer to first Interrogatory — I was fifty eight years of age on the seventeenth day of September AD 1855. my occupation is farming and I reside about a mile from the town of Newburgh in the County of Warrick and State of Indiana —

Interrogatory second = Are you acquainted with the parties to this suit. If yea, state how long you have known them respectively?

Answer to second Interrogatory — I am acquainted with the parties to this suit. I am known Burton Ayres since the year AD 1830 and I am known Andrew Chinpatter since the year AD 1836, that is I became first acquainted with them in those years.

Interrogatory third = State whether or not you are acquainted with Samuel Lapsley deceased, late of LaSalle County and State of Illinois if you are acquainted with him, state how long you are acquainted with him, and where?

Answer to third Interrogatory = I was acquainted with Samuel Lapsley. I became acquainted with him

first in St Louis in the State of Missouri about the year one thousand eight hundred and twenty eight or twenty nine. And in the year AD 1830 the said Lapsley and myself moved from the State Missouri to the State of Illinois, and I was well acquainted with him up to the time of his death, and was at his bed side when he died—

Interrogatory Fourth = State if you know whether said Lapsley is living or dead, if dead, when he died, and whether he made a will, and if he made a will, state who were named as Executors in said will?

Answer to Fourth Interrogatory—
Samuel Lapsley is dead. I saw him die. He died as near as I recollect about the ninth day of June in the year one thousand eight hundred and thirty nine. The said Lapsley did make a will, and myself with William Waddingham and Burton Ayres were named as Executors in said will—

Interrogatory Fifth = State if you know whether or not any of the persons named as Executors in the said will refused to take upon themselves the Executorship of said will. If yea, state who so refused and state fully all the circumstances of such refusal when it was, where it was, and what was said and by whom, and every thing that was said and done in reference to such refusal of any. State fully and particularly?

Answer to Fifth Interrogatory
Yes two of them refused to take upon themselves the Executorship of said will to wit William Waddingham

(41) 42458-28

and Burton Agnes – some ten or twelve days after the death of Samuel Lapsley myself together with William Waddingham and Burton Agnes went to Ottawa with said will to get it put upon record and we there deposited it with the probate judge for record and on my return home (at that time I lived in the said County of LaSalle State of Illinois) the said Waddingham said that he could not act as such Executor because he lived in St Louis, in the State of Missouri it was too far off for him to attend to the business – I do not think at that time that Burton Agnes said anything about not acting as such Executor but some two or three days after the refusal of Waddingham Agnes stated. Burton Agnes (at said County of LaSalle) on my asking him if he intended to act as such Executor, he declined and said he did not want anything to do with it, he said that he did not want to ask any one to go his security, he also said that one person could do the business just as well as ten or three, and therefore he said he would not act as such Executor.

Interrogatory 4th – State whether or not you were present at the time and place where and when said will of Samuel Lapsley was proven and recorded, if so state in what term, in what County and State and before what Court the business was transacted?

Answer to 4th Interrogatory – I was present when the said will of Samuel Lapsley was presented for record, I did not see it recorded. I saw one of the witnesses to the will to wit Adam Gunn know and heard him prove its execution but I do not

recollect of being present at the time the other witness was sworn — The business was transacted in the Town of Ottawa, in the County of LaSalle and State of Illinois, and before the probate Court of LaSalle County — & afterwards was informed by the Judge of probate that the said will was duly proven and recorded

Interrogatory seventh = To whom were letters testamentary granted for the management of the estate of said Lapsley?

Answer to seventh Interrogatory — The said William Waddingham and Burton Ayres refusing to act as Executors of said will of said Lapsley, letters were granted to one Abner.

Interrogatory eighth = State whether or not William Waddingham and Burton Ayres or either of them were present in Court at the time the said probate Court granted letters testamentary to you if they or either of them was to present state fully all that they and each of them said or declared touching the question as to whether they would serve as Executors of said will and if they were not present when the Court granted said letters then state fully and particularly whether said Waddingham and Ayres or either of them knew or had notice that said Court was about to grant said letters to you and what means of knowledge they had on that subject if any or whether they or either of them sent any message to said Court in reference to them refusing or accepting such Executorship and state fully what each of them said on that subject and whether or not what they said was made known to the Court and if so how and by

whom was it to be made known to the Court?

Answer to eighth Interrogatory — They were not present in Court at the time said Probate Court granted letters testamentary to me — Waddingham did not know that said Court was about letters to me, that is, if he knew it. I am not aware of it, for I gave him no information on the subject he being in St Louis and having previously agreed as well as Burton Ayres to act as such executors — Burton Ayres may have known that the Court was about to grant letters to me from the fact that we had frequent conversations on the subject — he advised me to go on with the business. And he also knew that I was making preparations for taking out letters. There was no special message sent the Court in reference to their refusing to act that I am aware of. But I am certain that I informed the Court at the time that I applied for letters of the refusal said Waddingham and Ayres to accept the executorship of said will. And when I so informed the Court the probate judge informed me how I had to qualify and said that I could act alone in the business.

Interrogatory Tenth — State if you know whether or not the said Ayres and Waddingham or either of them had notice or knowledge that said letters were granted to you alone. If so state how soon after said letters were granted to you did they know of it and whether they or either of them ever objected or in any manner questioned your right to act alone or whether or not they or either of them ever manifested any willingness to act as executors

of said will?

Answer to ninth Interrogatory

They both knew that letters were granted to me alone - Burton Ayres knew it by my informing him of the fact in a few days afterwards - William Waddingham may have known it also in a few days after letters were granted to me but of this I cannot positively say - But I am positive that he & Kenrick Waterman are and two years after letters were granted, from this fact, for about that time I went to St Louis to see him to transact business with him, then I informed him that I was the only person to whom letters testamentary had issued - Neither of them ever objected in any way or in any manner questioned my right to act alone as executor of said will - neither did they or either of them ever manifest the least willingness to act as executors of said will.

John Laughlander"

I John B. Handy of the County of Warrick and State of Indiana, a Commissioner duly appointed to take the deposition of the said John Laughlander a witness whose name is subscribed to the foregoing deposition do hereby certify that previous to the commencement of the examination of the said John Laughlander as a witness in the said suit between the said Findrew Steinfelter plaintiff and the said Burton Ayres defendant he was duly sworn by me as such Commissioner to testify the truth in relation to the matters in controversy between the said Findrew Steinfelter plaintiff and the said Burton Ayres defendant so far as he should be interrogated concerning the same, that the said deposition was taken at my office in the Town of Newburgh in the

[12458-25]

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County of Warrick and State of Indiana on the 26th day of October AD 1835 and that after said deposition was written by me as aforesaid, the Interrogatories and answers thereto as written down, was read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent John Funghauser before me the said being administered by me as such Commissioner at the place, and on the day and year last aforesaid.

John B. Hardy
Commissioner

The defendant then gave in evidence the letters testamentary issued by the probate Court to John Funghauser which letters testamentary were in the words and figures following, that is to say:

(See letters testamentary set out in agreed case above)

The defendant then proved by the witness Raymond that there was no evidence on the records of the probate office that either Agnes or Waddingham ever applied for letters testamentary.

The defendant then read in evidence the deed from John Funghauser as executor of Lapsley to John & Mary Freeman — a copy of which deed is set out in the agreed state of facts above set forth

The plaintiffs counsel objected to all the oral testimony, or testimony of acts in pais as not competent to show a refusal on the part of Agnes & Waddingham to act as executors, but the Court admitted the same subject to be considered or rejected as the Court might determine on full consideration

The defendant then rested his case.

The plaintiffs then called the witness Raymond who

certified that he had examined the files and records of the probate office and could find no evidence that any citation ever issued from the probate Court to Eyres or Waddingham to appear and qualify as executors of Lapsley's will.

A Japan in the words and figures following was then shown the witness, to wit;

[1245-24]

and the witness Raymond testified that said paper was among the files in the probate office – that Henry G. Litton was probate Justice April 5, 1848 & that said paper was in his hand writing – Knew James Simpson in 1848 – don't know whether he was a Constable – thinks the endorsement on the back paper is in Simpsons hand writing – The plaintiff then offered said paper in evidence, defendant objected & the Court sustained the objection – The witness Raymond further testified that there was nothing on the records of the probate office showing the payment of the legacies and that Farquhar left this part of the County in the Spring or Summer of 1848.

The plaintiff then called on Samuel Quigley who being sworn testified that he was acquainted with Samuel Lapsley and with Henry Kleinfelter and Mary his wife – Mrs Lapsley told me she was his sister – Mrs Klein told me she was his sister – I knew a good many of the children of Mrs Kleinfelter – I think the eldest was Martha – the next is either Fein or Margaret – don't know which is the eldest – I suppose the next is dead – don't remember her name I helped to bury her – She was a young woman think her name was Eliza or Elizabeth She died two or three years ago – there was one Wm or Willis – one Peter or Preston – there are some dead Elizabeth and another whose name I do not remember – I think I saw one named Lucinda Mary Kleinfelter is not now living, she died some four or five years ago – Don't know Fenderson Kleinfelters age – he was a little boy or child in 1838 I supposed him to be 3 or 4 years old then – I han

State of Illinois
Lasalle County } ss The People of the State of
Illinois To John Langhender administrator
of all and singular the Goods Chattels &
personal Estate of Samuel Lapsley dec'd
Greeting:

You are hereby required to appear
before our probate Court in and for said County
of Lasalle at the office of the Probate Justice
in Ottawa on the 15th day of April 1848 at 10
o'clock in the forenoon to render an account
of your proceedings in the administration of
the estate of Samuel Lapsley deceased or
show cause why an attachment should not
issue against You and to answer the
application of James Cunningham a
creditor of the deceased

In testimony where of Henry G Cotton
Probate Justice in and for the said
County of Lasalle has hereunto set
his hand and affixed his seal of
office this 5th day of April 1848

H. G. Cotton

[1245B-27]

Executed this writ by reading to [illegible]
Garrnisher April the 12th 1845

J. S. Simpson
Const

Serv writ 25
mileage 15 — 75
100

been acquainted with the family since 1838 & upt.
a few years when I was done below

On cross examination the witness Quigley stated that he knew Burton Ayres very well in 1838 & 1839 — The defendant then offered to prove by the witness Quigley that after Lapsleys will was made and before Lapsleys death that Ayres told Lapsley that he (Ayres) would not serve as executor — This testimony was objected to by the plaintiffs Counsel and the Court sustained the objection to which decision of the Court in sustaining said objection the defendant by his Counsel then and there excepted —

The witness Quigley further testified that he lived with Lapsley for some time and was familiar with his affairs — that Lapsley was in debt about all he could get debt — his pecuniary prospects was small — that witness left him because he was afraid he couldn't get his pay — that witness did not know how much Lapsley was in debt — there were people owed him but he couldn't get his money — I heard him curse them because he couldn't get his pay —

The testimony was here closed when plaintiff recalled the witness Quigley who testified that he had stated that Mrs Cleinpeter died some 4 or 5 years ago, but what Mr Holbrook (plffs Counsel) said to him made him have a better recollection of it & I now think it was within three years, that when he testified before his impression was about four years — Mr Holbrook said it was 2 years or 2½ and asked me wouldn't my recollection be better & I thought my recollection was better after he spoke to me — Holbrook asked me about the time of

2458-28

(49)

Mrs Hemptstead dead & I told him I had paid the debt inside of six years —

This was all the evidence given or offered in the case.

The Court after hearing the argument of Counsel decided that it was incompetent to prove that Burton Ayres and William Waddingham refused to act as Executors of the will of Samuel Lapsley deceased by any other evidence than record evidence or by a citation having issued to them for that purpose or by them having renounced in writing — and thereupon the Court on motion of plaintiffs Counsel excluded all the evidence of the witnesses Messrs. Lindley, Leland, Raymond and Quigley and Vaughander on that subject — to which decision of the Court in excluding said evidence the defendant by his Counsel then and there excepted — and the Court further ruled and decided that the record of the probate Court of the 8th of September 1839 from said Court did not show that said Ayres and Waddingham refused to act as Executors of said will. and thereupon the Court found the issues for the plaintiffs.

The defendant by his Counsel then moved the Court for a new trial in said cause which motion was overruled by the Court — to which decision of the Court in overruling said motion for a new trial the defendant by his Counsel then and there excepted.

The defendant by his Counsel then entered a motion in arrest of judgment, and the Court overruled said motion in arrest of judgment. to which decision of the Court in overruling said motion in

arrest of judgment the defendant by his counsel
then and there excepted.

The Court then rendered judgment in favor of
the plaintiff for the recovery of the premises
mentioned in the declaration to which decision
of the Court the defendant by his counsel then
and there excepted and prays that this his bill of
exceptions may be signed sealed and made a
part of the record which is done in open Court

[redacted] E. Collier Lea
Judge 9th Circuit

On the 11th day of March A.D. 1867 the
defendant in pursuance of the order of said
Court filed his appeal bond in words and figures
following viz:

[12458-29]
(51)

Know all men by these presents that we, Burton Ayres and Adam Vroman of LaSalle County in the State of Illinois are held and firmly bound unto Sindrew Clinefelter of the same County in the penal sum of one hundred dollars, to the payment of which sum well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Witness our hands and seals this 9th day of March A. D. 1857.

The condition of the above obligation is such that whereas the said Sindrew Clinefelter did at the February special term of the Circuit Court in and for said County in the year 1857, recover in said Court a judgement in ejectment against the said Burton Ayres, for the recovery of the possession of certain real estate claimed by the said Sindrew Clinefelter in fee, besides costs of suit, from which judgement the said Burton Ayres has prayed an appeal to the Supreme Court of said State- Now if the said Burton Ayres shall duly prosecute his said appeal, and shall well and truly pay whatever judgment Costs, interest and damages he may be required by said Supreme Court to pay in case said judgement shall be affirmed by the said Supreme Court- Then the above obligation to be void- Otherwise to be and remain of full force and virtue.

Burton Ayres (Seal)
Adam Vroman (Seal)

$124.58-30

(54)

State of Illinois } I John F. Nash Clerk of the Circuit
La Salle County } Court in and for said County and
State do hereby Certify that the
above and foregoing matter in the case of Lindsay
Chamberlain vs Benton & Ayers comprises a true,
full, perfect and complete record of all the
orders of the Court and of the papers on file in
my office in the said entitled cause, the
same making a full record.

In Testimony Whereof I have hereunto
set my hand and the seal of said Court
at Ottawa this 3d day of April 1857

J. F. Nash Clerk

In the Supreme court - 3rd Grand Division
April term 1857.

Burton Ayres appellant
vs
Fendrun Mumpleton appellee
} Appeal from La Salle

And now comes the said appellant by Dickey & Wallace his counsel and shows to the court that there is manifest error in the record and proceedings aforesaid of the circuit court of said Lasalle county, in this to wit

1st The court erred in excluding the written memorandum offered in evidence by appellant in connection with the testimony of the witness Doe.

2nd The court erred in excluding the testimony of the witnesses Doe, Dudley, Raymond, Leland, Quigley and Fauglander on the subject of the refusal of Ayres and Waddington to qualify as executors.

3rd The court erred in ruling that the record of the probate court of Lasalle county did not show a refusal by Ayres and Waddington to serve as executors.

4th The court erred in finding the issues for the appellee.

5th The court erred in overruling appellants motion for a new trial and in arrest of judgment.

6th The court erred in rendering judgment for appellee.

7th ~~The court erred in~~ The record did not

1245-3rd

authorize the rendering of the judgement in the court below—

8th On the evidence offered the court below should have found for appellant—

9th The court erred in rendering the judgement aforesaid in manner and form aforesaid—

wherefore for these errors and others apparent on the face of the record the said appellant prays that the judgement of the court below may be reversed &c

Dickey & Wallace
counsel for appellant—

and now comes the said defendant by E.S. Holbrook his attorney & says that there is no error in the said record of proceedings aforesaid or in giving the judgment aforesaid and he prays that said judgment may be in all things affirmed

E. S. Holbrook
Defts Atty

#0
Benton Ayres
36 vs
Findlaw Clingfelter
Record

Filed April 22. 1857
L. Leland
Clerk

Fees $15.75
paid by Ayres

Burton Ayres
vs
Findorn Kleinfelder } Appeal from La Salle

Brief for Appellant –

The Record of the Court, Probate, shows a judgment, it is a judicial determination that Faughander was entitled to Letters as sole Executor –

Grigson v. Astor et al 2. Howard 319 –
Voorhies v. Bank of U.S. 10. Peters 449 –
Young v. Doran 11. Ill. 624 –
McPherson v. Kintz 11 Serg & R
Probst v. Meadows 13. Ill 169 –

The Law prescribed no one means which the Probate Court should use to ascertain the fact of repusal, the presumption is, that the court had the proper jurisdiction –

This record can not be contradicted, the presumption is

[2458-33]

that all facts necessary to be found to authorize the judgment have been found —

See cases before cited —

What does this record determine? What is the force of the word decline as there used, under the principle that the Law presumes that the Court found all that was necessary to be found to authorize its action?

Decline sometimes means refuse, if it means this here, then this order is proper & right, if it means something else, the probate Court has been guilty of an unwarrantable assumption of power —

(over)

The decision of the Court is evidence that every fact is true, which was necessary to give them power to make the order ~

If the two Executors have been declining for twenty years, it ought to be considered a refusal by this time, if they ever ceased to decline, that is an affirmative fact which they ought to show ~

A refusal of one or more executors to take the executorship, may be shown by matter in pais, and in some cases will be presumed ~
3. Barn & Ald 31. (5. E. L. 221.)
(vide Holroyds opinion in which he refers to Bonifant v Greenfield Leonard
1 Brooke R. 80.) 3. Mumford (Va) 345.
1. Randolph 108 ~ 4. " " 341.
4 Leigh 152 ~
Taylor & Conf. L. & Eq. R. (N.C.) 135 ~

(over)

Wood v Sparks 1. Dev. & Bat. 389 –
Ayres v Ward 16. Conn 291 –
Thornton v Munston 4 Leigh 152 –
Mar v Peay 2 Murphy 85 –
Leavens v Butler 11 Butler 380 –
Robertson v Gaines 2 Humph 367 –
1 Yates 422 – 16. Searg & Rawle 416 –
Bodley v McKinney 9 Smedes & Marshall 357

Sugden on Powers 78
3 Binney 69
1 Ohio 232
15 John R 348

1 Caines Cases 16
14 John R 527
4 Har & McH 485
2 John Ch R 20

would it not be a Judicial act if Hon[?] had issued letters of administration with the will annexed ~~would it not~~ and had determined that all the executors had refused to execute the will, if so would it not be a Judicial determination to determine that two of them had renounced; and that one of them was entitled to letters as sole executor

B. C. Cook
of Counsel for appellant

1 Ohio 232

Ayres v Kleinfelter } Brief –
56 – 128
Appellant –
Filed May 11, 1838
[illegible] Leland Clk
Costs

Supreme Court---3d Grand Di.ision---April Term, 1858.

BURTON AYRES,
vs
FINDREN CLINEFELTER,
} APPEAL.

THE ARGUMENT OF COUNSEL FOR APPELLEE.

This case has been here before, and in a condition not materially different from what it is now. It was admitted by Clinefelter before that the other executors, Ayres and Waddingham, *declined* to act, and never qualified or acted. This was understood to mean at least a declination *in pais;* that is to say, a declination or refusal by words, or acts, not evidenced by record or by writing. In fact there could be no declination less than this. Upon this the decision was made, and it was said that the question was one of *refusal* under the Eng. Statute, and that the court was not satisfied with the quantum of the evidence of such refusal, by Ayres and Waddingham.

This question of refusal was fully discussed, and I do not see why it is not placed beyond controversy. The meaning of a *refusal* to accept, under the Eng. Statute, was fully established by all the English decisions, by a majority of the American decisions, by the text writers, and also by our statutes; and, I believe I may say, that it is held to be *a renunaeition* in *open court* or *by writing*, which is recorded in the proper office. This court so held, the case went back, and a trial was had in accordance with the instructions of this court.

But now it is brought here again with no more than very indifferent proof of a declination *in pais*—a refusal by words only, or by mere neglect. It seems to me that the decision to be given is a foregone conclusion, and that no argument can be had upon it, except upon the proposition to the court to review and overrule its former decision. It is true the decision is in the negative form; but when a court, that respects authorities, says that "*the refusal cannot be by mere words or other matter in pais. is well supported by authorities,*" though negative, it would seem to have all the force and fixedness of an affirmative decision.

If I should rely upon my own judgment as to the law, I should stop here and rest confidently on the opinion that has been pronounced; but as an attorney is very liable to misjudge his own case; as this question is one of great importance to the claimants, (one of whom only is here;) as there are two new members of the court, and who did not hear the discussion, (upon which fact undoubtedly the appellant places his chief reliance,) I will proceed further with the argument.

I will not enlarge upon the authorities quoted in the report in favor of an actual renunciation. They are correctly rehearsed, and they fully sustain the opinion given. There is probably but little more to be found in the English decisions. Long ago the doctrine seems to have been so well settled there that there is no more controversy. There is only the dictum of Justice Holroyd, in Tounson vs Tickell, (where the renunciation was in fact by deed,) that is outside the general current of authorities. I have searched diligently the English references, and found nothing of an opposing character; but I have found a few cases wherein the same principles are recognized, and I will add them to that list. The American authorities I admit are not so uniform—some States, two at least, having adopted a different rule.

The doctrine of actual renunciation is approved in vol. 8. Common Law, Rep. p. 396, and also in vol. 82 do p. 750. Dayton on Surrogates, pp. 201, and 582, shows the New York statute law and practice.—Under their statute, which has added neglect, this neglect is evidenced by a refusal or neglect to appear before the court on citation or publication. The same doctrine, in 2 Bradf. 8-28. Penn, 465 Schoenberger's Ex. vs Lancaster Saving's Institution. One appointed executor remains such till he renounces and *is discharged by the court.* In 3d Kernan, 93, Burnett vs Silliman, the doctrine of renunciation is approved, though the disclaimer need not be in form to pass an estate.

The appellant's authorities were all, or nearly all, cited before and there is nothing new that I discover. A different rule prevails in Virginia and North Carolina, and this was conceded before But in any conflict of decisions between England and our sister states, it ought to be remembered that those of England are authority to us. If they are a part of the common law, they are adopted by statue, and it is a principle of law that when a legislature adopts or copies the laws of other states or countries, it adopts the construction given to such laws by such countries. The decisions of other states do not come to us with the tone of authority—we may consult them for enlightenment only. This court then is under obligation by statute and a well recognized principle of law, to follow the decisions of England on this statute of Hen. 8, and not the decisions of our sister states. See 29 Alabama 538 Armstrong vs. Armstrong's heirs, where the decision to this effect is made upon their statute of wills which is copied from 29, Car. II.

In reference to Virginia and North Carolina, perhaps other States, it may be remarked that they have added, by their own statute, to the English Statute, neglect or omission to qualify. And when such is the case, the courts more easily glide into decisions which accord with such statutes. The decision in 3d Munf. 345, referred to by appellant, was upon a will made in 1784, while the new statute was passed in 1785. The sale was made in 1794, 10 years after the statute took effect.

Perhaps I would be justified in remarking as to the cases in North Carolina, that these authorities are not of equal dignity with others, and, it will be observed, that the court did not deal with authority, but actually misquoted, as will be seen by reference; and while it admits the decisions of England, denies their authority. In the case of Devereux & Battell the decisions of England are admitted to be as I insist they are, but their correctness and authority are denied. The dictum of Justice Holroyd is quoted as good law, while the actual decision is ignored. The case of Cro. Eliz 80, is quoted as authority for presumption of refusal by neglect, while the case shows no such law, only a refusal, but not in what manner. It is of course a refusal according to the law of England. The case in Taylor and Conference quotes no authority, and it is made without discussion.

When one decision in a State is made, it is usual and natural that it be followed without much question thereafter. In these cases the principle applicable is that a renunciation *may* be presumed after a long time, which, in 2 Murphy 84, was 20 years, and may be proved as a matter of fact before a jury as any other matter *in pais*.

Suppose that this were the rule in this case. This court cannot say that the proof is made out. There is no legal testimony as to Waddingham's declination, even in that way. This sale was in less than two years after Faughender was qualified. The testimony of Hoes, who says he don't know as he ever saw Waddingham, as to his impression at the time, from his course of business, &c., is not lawful proof, and I would not spend time in refuting or extenuating it. But Faughender, their witness, says that Waddingham did not go before the court, nor know of his taking letters till one or two years afterwards.

This trial was by the court, and the burden of complaint of the appellant is that the court refused to grant a new trial. But he should show why a new trial should be granted. Now it is no cause, unless that the testimony that was ruled out was legal, and would have proved something material. The only evidence offered by defendant below, as to Waddingham's refusal, even by words, was by the deposition of Faughender. If this deposition was rightfully ruled out, it matters not whether the court gave, or did it for, the right reason. The plaintiff below objected to the reading of this on trial, on account of the interest of Faughender, which was apparent, as he had given a warrantee deed for the premises in dispute, and under which defendant claimed. The appellee was not present when the deposition was taken, The objection was of substance, not of form. The interest was not necessarily apparent to the plaintiff, and could not be made so to the court until trial, when the defendant would use his title papers. [On this see 2 Stockton's.Ch. Rep.96, where a Trustee, who had given a warrantee deed, was not allowed to testify on account of interest.] So the decision of the court was in fact right in excluding the deposition, though for another reason than the one given, and appellant has no cause to complain of such exclusion. And this deposition ought now to be considered out of the case; and being out of the case, there is no evidence of Waddingham's refusal, even by words.

But even the deposition being in the case, the court correctly refused a new trial, because the testimony as to him and also to Ayres, was of so trivial, so light and unsatisfactory a nature, that it would not justify a finding for the defendant, even had the matter attempted to be proved been a lawful defense—which is not admitted.

Concerning the testimony of Hoes about the making the entry in the Probate record, it can't be contended for a moment, that it is lawful evidence. If it be a record you cannot go behind it,—if it be not a record, it is good for nothing as proof, and verbal matters concerning it, if possible, still worse. It can't be used to show what he thought concerning their "*refusal*" for *the fact* is only to be looked at—but if it be used to show what he thought, it is still worse for the appellant, for it shows that his thought, as to the refusal, changed before he made the entry.

But it has been held by the court that the proceedings of the Probate Court were simply ministerial, and are evidence only of the due proof of the will, the issuing of letters, &c., and I have no reason to fear that it will change its position. By the other rule the evidence of title is unfixed, floating, shifting, uncertain, depending on fortune, the lives, the recollection and the opinions of witnesses.

I will close on this branch of the case by suggesting the propriety of standing by the decision already made, not only as a matter of principle, "*stare decisis*," but for affording greater security and better evidence of real estate titles.

In the present case, if verbal proof can be made of the action or non-action of Ayres and Waddingham, and so effect a recovery, we can see at a glance the great uncertainty of the title. This time the defendant below relied on the testimony of Faughender, who, after absconding from the country to parts unknown, without answering a citation served from the Probate Court, *turns up* in behalf of his co-executor, who now is found in possession of the property he sold, interested as he is from giving a warrantee deed, and a defaulter to the amount of $800, since 1842. So another time parties might be more or less successful in gathering up transient and fading testimony, and more or less successful before a jury, who would pass upon the proof. Even supposing the array of authorities presented by appellant to be respectable compared to those presented by the appellee, which is denied, the court cannot hesitate to prefer that course that will give firmness and stability to real estate titles.

Concerning the discussion of Chief Justice Scates, in the forepart of the decision, as to the power given to the executors in this will, whether it be a naked power, or a power coupled with a trust, and the proof in this case made by defendant below, apparently in consequence of it, as to the personal property of Lapseley, I have here little to say, as I cannot see what possible bearing it can have on the case at bar. It was finally considered that the question was one of refusal, and that it makes no difference whether the power be considered the one or the other. Suppose it be a power coupled with a trust—the donees are the trustees of the power, and without a renunciation or death of the rest, one cannot execute it alone. But I insist on this, that the quality of the power must be determined by the will itself It is a not case of *latent* ambiguity. You cannot go outside of the testator's will to discover what his will is. And he impropriety of doing so in the present case, so as to affect the character of the conveyances and title of real estate, is very apparent. In doing so you would come to that which is totally impalpable and unreliable. If you would seek his statements, he might at one time represent himself as rich, sometimes as poor. He might think he was poor when he was rich, and vice versa. He might not intend to state the facts. If you can consult his neighbors, their opinions would vary infinitely. Besides the testator might have property unknown to them, and he might appear to have property which he did not own. His and their opinions would also vary about his creditors' solvency. Proof was here made as to their solvency in 1840. Their standing then may have been vastly different from what it was in 1839, when the will was made. It was so in fact—as in the meantime a commercial storm had swept over the country. The mode of proof by inventory, &c., to prove the meaning of the will, was preeminently improper. The executor may not have made a correct inventory. But he inventoried claims of ver $4,000. Lapseley, at the time he drew his will, may have known of other property, and may well eave considered his personal property worth $9,000.

[12458-36]

I suppose it is intended by this proof to show that Lapseley, by his will, devolved upon those he named his executors a power coupled with a trust. On this branch of the subject it matters not what kind of power was conferred, and so it matters not as to the proof. But if appellant designs now to establish the character of the power, I insist that he should do it by legal testimony.

On the face of the will, the power appears to be a naked power—for the object of it is not clearly stated. The language is ambiguous, and you are left in doubt. It is a patent ambiguity. I admit it to be true if you can resort to proof and find that testator had not personal property sufficient to pay debts and legacies, you would naturally conclude that testator meant that his executors should sell to pay debts and legacies. But then you are not permitted to resort to such proof. The testator has committed his will to writing, and that must be relied on solely as evidence of his will. The presumption of law is that the testator intended his personal property to pay debts and legacies. See the opinion rendered in this case. Also 2 Stocktons Ch. Rep. 158, and post.

The court will construe this will as it does other writings, without the aid of witnesses, directly or indirectly to vary it.

1 Johns Ch. Rep. 234 See 18 Ills., 126, Sigsworth vs. McIntyre.

1 Greenl Ev. Sec. 297—300. 288, 289 + notes

But even if it be admitted that the thing to be proved was proper, and the mode proper, still the proof was insufficient, and the court was justified in not awarding a new trial in this respect.

2. I will now consider my next point If the court will modify the position which it has already taken, and proceed farther on the ground that the refusal of the executors might have been made out by proof of words and acts *in pais*, and that it is so made out I will suggest that this cannot affect the case at bar on this ground—that a two fold office, and two fold duties or two offices and the seperate duties thereof were devolved upon Faughender, Ayres and Waddingham by this will. The one that of simple executors, in which their duties and acts would pertain to the personal property according to the statute and the common law, and the other that of trustees of the extraordinary power granted in the will over the real estate, in which their duties and acts would concern the real estate only. As to the latter, the Probate Court had nothing to do. In the latter capacity their power was derived from, and was perfect under the will—they could confer good title without any action of the Probate Court. The consequence is, that any action of the Probate court would not enlarge or restrict their authority—that they might refuse or resign one office, and retain the other. And further that the proof in this case, (suppose it may be regarded as proof,) that Ayres and Waddingham refused the *executorship*, it does not follow that they refused the other office. So I say, as I think I have a right to, that defendant below presented not a particle of proof of such refusal.

This construction is reasonable, and has always been sustained wherever it has been pointed out and insisted on. In the authorities presented by appellant, it has been lost sight of or not insisted on, and "*executors*" as such, where bothoffices have devolved upon them have confusedly intermingled their acts over the real and personal estates. But generally in England and in this country, Probate Courts have not had, and have not assumed to have any authority over the real estate any further than special authority has been given by the Statute. Suppose these three persons were appointed executors, and three others were endowed with the same power over the real estate that is given to them—it is plain that these three would have nothing to do with the Probate Court. How shall the first three then when only the same power is given? Suppose two were made executors, and to these two and a third were given this power. Shall the two act under the court and the one not? The absurdity is very apparent. Though the same persons then act in the same two fold capacity, the officers rights and duties are not commingled and confused—but the line of demarcation still remains—and where one ends the other commences. On this point I will present the following authorities.

Statute of Wills, Sec. 93.—This is confirmatory of the common law. The words *persons* and *executors* are used interchangeably. So it makes no diffetence whether those who are appointed executors are also entrusted with the power—or other persons, they are not in any wise under the control of the Probate Court. It is sufficient if the power be exercised in the manner and by the persons named in the will. There is no restriction, and the other parts of the statute do not militate against these. The form of bonds, oaths, and the proceedings and rules of action for the court all show that nothing but personal property is intended to be put under its control. It has been held that administrators *cum testamento annexo* have nothing to do with real estate under a power in the will, but the form of bond and oath is the same for each. When the land is sold and the money received, then it is to be disposed of in due course of administeation, under the direction of the court.

In New York this construction is taken by Statute. See Dayton on Surrogates p. —, where the statute and rules of practice are given. It is provided, first, that the sale be according to the power, then the money be brought into court for distribution.

distinction

2. Gilman, 176. Hall vs. Irwin.

This case which maintains the ~~destruction~~ between the two offices, though held by the same persons, is the opinion of our own court. True the decision was not on exactly the same point now before the court—but the reasoning is good—and is as good for this case as it was for that. In fact the case of the appelant her requires a virtual abandonment of the reasoning and principles of that case.

5 Wend. 224 Judson vs Gibbon.

21 Wend. 430, 438 Conklin vs. Edgertons, Admin'r.

These cases maintain the same doctrine—the latter by a review of the decisions and the ancient law in a manner and to an extent most critical and learned, triumphantly sustains this distinction.

7 Cushing (Mass.) 576 Clark vs. Tainter.

One holding both offices resigned the *executorship*, it was held he did not resign the other. See also 13 Metcalf, 221, same doctrine.

4 Sand'f Rep. 401. Dominick vs. Michael.

The power one takes by will not affected by Probate.

2 Mich. 531. Battelle vs. Parks.

When executor has power of sale under the will, he may sell without probate.

3 Kernan 587. Newton vs. Bronsan, Ex. See also p. 93.

Executor can convey lands in another State, under power in a will.

1 Ohio Cond., Rep. 278. Wells vs. Cowen.

But an Administrator cannot though the laws of his own State authorize it.

3. Curtis, C. C. Rep. 412, same doctrine.

3 Lomax Digest, 395, 397.

Where power is given to executors, they may exercise it, although they renounce probate of the will

16 Pick, 93. Going vs Emery.

Court would not grant license to those having power of sale by will.

36 Com. Law Rep. 438. Executor's derive title from the will although not proved.

It is held also *passim* that executors may sue and declare before probate—and probate by one,

[12458-37]

enures to all—the power being already perfect.

33 Com. Law Rep. 944. One taking under power takes under donor, not donee, of power.

4 Sandf. 374' A power which one takes by force of the will, and not by probate, not affected by renunciation.

I believe the distinction between these two officees, and the consequent distinction b etween the rights and duties of those exercising those rights and duties, wherever an attempt has been made to keep up such distinction, has been almost universally maintained. Wherever it has not been attempted, confusion has followed, and apparently discrepant opinions have been the natural consequence.

Such being the principles of law, and such the authorities, and such being the tenor of all the authorities where the question has been raised, I may with much propriety say that the court below erred not in refusing appellant a new trial:

1st. Because the proof offered by him as to the refusal or neglect of Ayres and Waddingham (or either of them,) to take letters testamentary was irrelevant, (the fact though proved as was proposed,) not being any part of defendant's lawful defense.

2d. Because all the evidence offered did not satisfactorily prove such fact, allowing it to have been a good defence.

3d. Because defendant was not entitled to the testimony of Faughender, on account of his interest; and this being out of the case, there was no proof at all as to Waddingham's refusal.

4th. Because all the proof offered did not prove a refusal in any way of the power or trust concerning the real estate.

E. S. HOLBROOK, Attorney for Appellee.

In written argument Con't.

[12458-38]

No 5 C. - 128

Cypress vs
Minnesotta.
Appeal.
Argument for
Appellee by
Ed Holbrook

Filed May 17. 1858.
S. Leland
Clk