

13390

No. _____

Supreme Court of Illinois

Meeker et al

vs.

Evans et al

SUPREME COURT,

SECOND GRAND DIVISION,

JANUARY TERM, 1861.

ABSTRACT.

Emily Meeker et al

Plff's in Error,

VS.

Henry B. Evans et al.

Def'ts in Error,

ERROR TO FULTON.

P. Record: On the 19th October 1858 the complainants filed in the Fulton Circuit Court their bill

1. for partition and assignment of dower, directed to Judge BAILEY in Chancery sitting," &c.
- The bill makes Henry B. Evans, Solomon Strouse, Ira Coney and Ellen Coney his wife, and Emily Meeker of Fulton Co. Ills., and James Russell and Sarah E. Russell his wife of Iowa, complainants, calling them "petitioners," and states that the "petitioners" together with Abner Meeker and Aaron Meeker of Fulton Co. Ills. are owners in fee simple as tenants in common of the real estate described in the bill, (including one half section and five other different tracts,) situated in said County of Fulton—Henry B. Evans owning one ninth, Solomon Strouse three ninths, Ira Coney and Ellen Coney one ninth, Emily Meeker one ninth, James Russell and Sarah E. Russell one ninth, Abner Meeker one ninth, and Aaron Meeker one ninth—and setting forth by averment the rights and titles of the parties. The bill states that Moses Meeker about the 7th March 1858 died intestate and seized in fee of the said real estate, leaving "as his heirs at law entitled to the next estate of inheritance" &c.
8. Levi Meeker, William and Matilda Janson his wife, Ira Coney and Ellen Coney his wife, Jeremiah Gray and Rachel Gray his wife, Johnson Farris and Mary Farris his wife, James Russell and Sarah Russell his wife, Emily Meeker, Abner Meeker and Aaron Meeker; and that said Levi Meeker, Farris and wife, Janson and wife and Gray and wife conveyed their interests, which passed into the complainants Evans and Strouse; that Louisa Meeker is the widow of said Moses Meeker and entitled to dower, &c.; that no persons other than said "petitioners" and said Abner and Aaron Meeker have any interest in said real estate; that said Abner Meeker and Aaron Meeker are minors under twenty one years of age, and that David Solanbarger is their guardian. The bill prays process against said Louisa, Abner and Aaron Meeker and David Solanbarger as guardian, &c.; that the dower of said Louisa be assigned; that a division and partition of said premises be had, and if it cannot be had so that sale be made, and that such other proceedings may be had in the premises as are authorized by law. No waiver is made of answer under oath. The foregoing shows all the statements and charges and the whole of the prayer of the bill.

11. Appended to the bill is a certificate of a J. P. that Henry B. Evans, "one of the petitioners, * * declared that the statements made in said petition were true to the best of his knowledge information and belief."

Summons having been duly served and returned for the Nov. term 1858, David Solanbarger as guardian for the said minors filed an unsworn answer at said term (12 Nov.) that they were strangers to the matters in the bill contained, and admitting that they were infants, &c.; and on the same day a decree *pro. con.* against Louisa Meeker and for reference for proofs was rendered.

- The Master's Report of proofs shows, among other things, that "the only heirs surviving" 20. Moses Meeker at his death were Levi Meeker, Matilda (who married Wm Janson.) Ellen. (married to Ira Coney.) Jane. (married to Johnson Farris.) Sarah. (married to James Russell.) Rachel. (married to Jeremiah Gray.) Emily Meeker, Abner Meeker (16 years old) and Aaron Meeker (eleven years old). No other showing appears as to the children of Moses Meeker deceased.

- On the coming in of the said report of proofs by the Master a decree was rendered by the Court, finding "the allegations set-forth in the complainants' petition" to be true, appointing 21. commissioners, awarding dower and directing "partition to be made of said premises among the said complainants and defendants in the following proportions, to-wit: to the said Henry

21. B. Evans one ninth part thereof in value, to the said Solomon Strouse three ninths parts thereof in value, the said Ellen Coney, wife of Ira Coney, one ninth part thereof in value, the said Emily Meeker one ninth part thereof in value, to the said Sarah Russell, wife of James Russell, one ninth part thereof in value, the said Abner Meeker one ninth part thereof in value, and the said Aaron Meeker one ninth part thereof in value," &c.

The commissioners appointed by the decree were sworn before the Master in Chancery that they would "fairly and impartially assign the dower of Louisa Meeker widow of Moses Meeker dec'd make partition of certain real estate described in a certain decree rendered on the 16th day of November A. D. 1858, by the Fulton Circuit Court in the matter of petition for partition of real estate Henry B. Evans and others vs. Abner Meeker and others now pending therein in accordance with the judgement of the court as to the rights and interests of the parties if the same can be done consistently with the interests of the parties and estate." The affidavit is without date, but was filed Nov. 16 '58.

The commissioners reported at the same term of court that they had been upon and examined the said real estate, set off the dower, &c., and that in their "opinion the said premises are so circumstanced that a division thereof cannot be made without manifest prejudice to the proprietors of the same."

And afterwards at the same term of court a decree was rendered approving the allotment of dower and for the sale by the Master of said premises, subject to the dower interest, at public vendue, after giving notice, &c. &c., and directing a division of the proceeds, after paying costs, &c., as follows: to H. B. Evans one ninth, Solomon Strouse three ninths, Ellen Coney, wife of Ira Coney, one ninth, Emily Meeker one ninth, Sarah E. Russell, wife of James Russell, one ninth, Abner Meeker one ninth, Aaron Meeker one ninth. There is no specification in the decree as to whether the land should be offered for sale in separate tracts or all together.

At the September term, 1859, the Master's Report of Sale &c. was filed, by which it appears that said Master, after giving notice, &c., offered and sold all of the said real estate, at public vendue, to Henry B. Evans and Solomon Strouse for \$5,000, they being the highest and best bidders. The report does not show that the different tracts were offered separately before being sold together.

And on the same day of the filing of the Masters report of sale the parties Emily Meeker, Sarah Russell and James Russell filed their Exceptions to such report, specifying the following grounds:

"1st. The proceedings for and in their behalf are without authority, and their appearance has been entered without authority.

"2nd. The real estate described in the report was sold *en masse*.

"3rd. The real estate described in the report was sold for an inadequate price.

"4th. Competition at the sale was discouraged, and unlawful combinations had to prevent a sale for the value.

"5th. The proceedings of said Master and the report thereof are otherwise informal, irregular and insufficient."

The said parties therefore prayed that the sale and report be set aside and other and further proceedings had, &c.

And in support of such exceptions said Emily Meeker, Sarah Russell and James Russell filed the affidavits of Jesse Benson, Jacob Meeker and Emily Meeker.

JESSE BENSON in his affidavit swears that Emily Meeker, Sarah Russell and James Russell sell named as petitioners were not residents of the State of Illinois at the time of the commencement of this suit, and that he (Benson) was acting as their attorney in fact before and at the time, and since that time, attending to their business in the matter of this suit, and that he was the only person in this State authorized to act for them, and that deponent never at any time authorized the attorney for the petitioners to act for or use the names of the said Emily Meeker, Sarah Russell and James Russell, or either of them, or assented to the same, and that deponent believes that the use of their names was wholly unauthorized and without their knowledge or consent or their subsequent ratification; that deponent is acquainted with the real estate described in the petition and subsequently sold under the decree rendered herein, and that he believes that injustice has been done to the heirs by too large an allowance to the widow, and he also states that the said real estate sold by the Master in Chancery is worth \$10,000.

JACOB MEEKER, in his affidavit, swears, that he was a brother of the late Moses Meeker; that he is acquainted with the said real estate described in the petition and sold by the Master, &c.; that he believes injustice has been done the heirs of said Moses Meeker dec'd by too large an allowance to the widow for dower; that in his opinion the value of the real estate set off to her is very nearly one half that of the whole of the real estate of which said Moses Meeker died seized; and that the said real estate described in the petition or bill and sold by the Master &c. is worth, according to deponent's judgement and belief, at least \$12,000.

EMILY MEEKER, whose name is used as one of the complainants or petitioners, in her affidavit, swears, that she was one of the daughters of Moses Meeker dec'd; that she was 19 years old the 14th Feb'y 1859; that she has been absent and resided in Iowa from September 1858 to August 1859; that she never authorized the use of her name in any manner in this suit as complainant or otherwise, nor has she since ratified or in any manner sanctioned the use of the same by the attorneys or solicitors for the complainants, or by any person in this

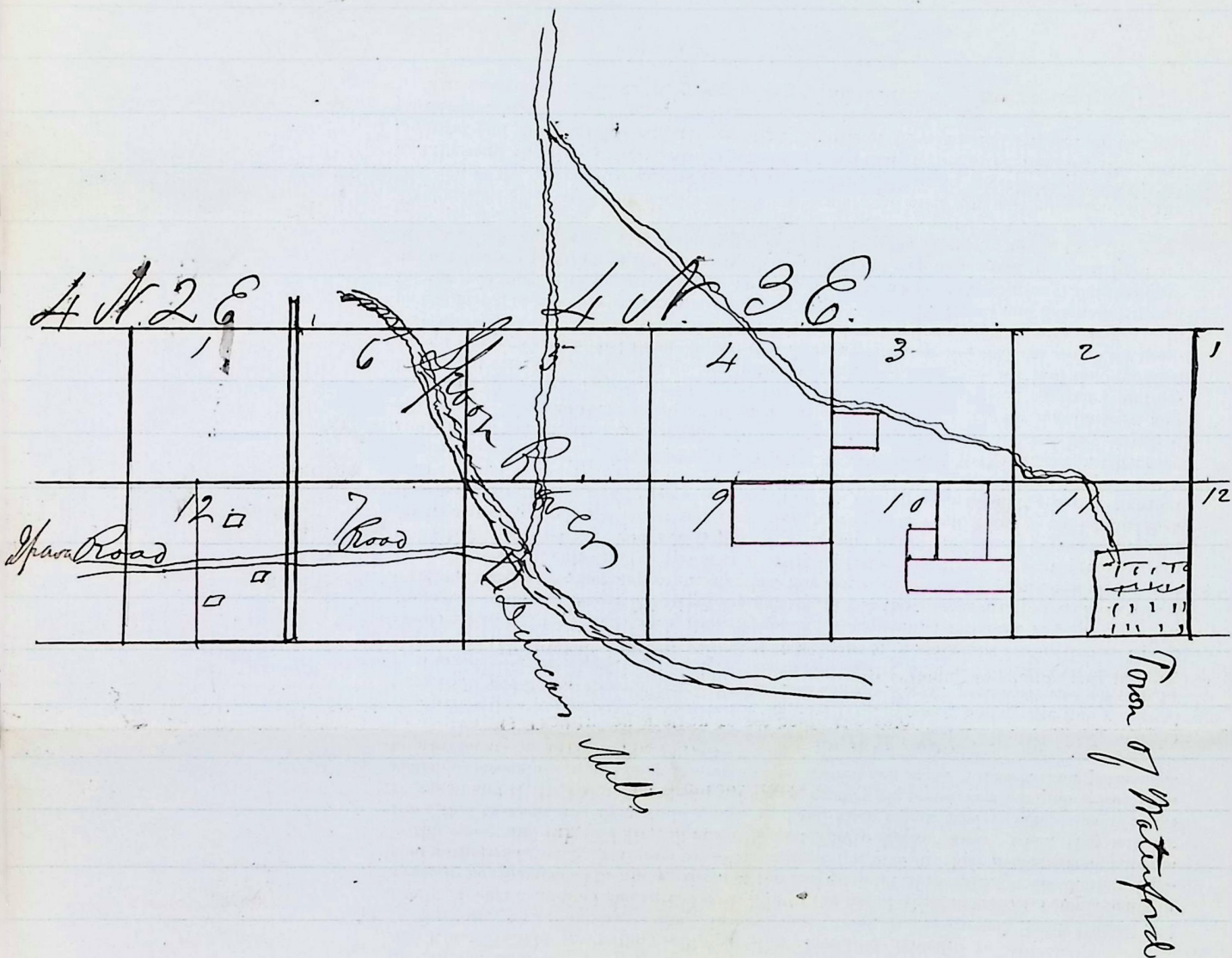
suit, nor has she ever authorized the said attorneys to act for her in any way in connection with this suit or the subject matter thereof, and that she never knew of the commencement of this suit until informed by letter from Jesse Benson some time in the winter of 1858 and 1859; that she is acquainted with the real estate described in the petition in this cause and sold by the Master, and that she believes injustice has been done the heirs by too large an allowance to the widow; and she also states that said real estate so sold is worth at least \$12,000, as she is informed and verily believes.

Thereupon afterwards the complainants solicitors filed the affidavits of Henry B. Evans, Matilda Ianson, Ira Coney and Solomon Strouse.

- 44, 45. H. B. EVANS swears that he is one of the complainants; that in Sept. 1858 he had conversation with James Russell Sarah E. Russell and Emily Meeker, that the two latter consented and agreed that their names might be used as compl'ts in this suit; that when they left for Iowa they well knew that this suit was about to be commenced and their names used as complainants and expressly gave their consent; that after said Russell and wife and Emily Meeker left the State he informed Jesse Benson of the commencement of this suit who made no objections; that affiant informed said Benson of the day of sale &c.; that Benson afterwards said he had no authority to bid at the sale; that affiant and Solomon Strouse purchased the land at a fair, open sale, and have entered into possession of said land and made valuable permanent improvements, &c.
47. MATILDA IANSON in her affidavit, swears that in Sept. 1858, she heard a conversation between Solomon Strouse and Emily Meeker, in which the latter expressly authorized and directed said Strouse to use her name as one of the plaintiffs in the bill of complaint in this suit; and that she desired partition of the premises to be made by bill of complaint in which her name should be used as one of the complainants.
- 47, 48. IRA CONEY swears that, in Sept. 1858, before the commencement of this suit, and at Lewistown he heard a conversation between Solomon Strouse and James Russell, in which the latter consented to the petition for partition of the real estate of Moses Meeker dec'd, and that Russell said he was willing said real estate should be divided.
- 49, 50. SOLOMON STROUSE swears that, in September 1858, James Russell, Sarah Russell and Emily Meeker consented and agreed with him to the use of their names as complainants in a case to be commenced for the partition of the real estate of Moses Meeker dec'd, that deponent authorized Ross & Stevenson the solicitors accordingly to use their names as complainants in this cause, and that said Russell and wife and Emily Meeker knew, when they left for Iowa, that this suit was about to be commenced and their names used as complainants; that deponent and H. B. Evans purchased said land as they supposed at a fair public sale for a valuable consideration, and have entered into possession and made valuable and permanent improvements on said land.
- 50, 51. At the said September term 1859 the court took the said Master's Report of sale and the exceptions thereto under advisement until the next term of court, and at the Feb'y Special term 1860 said James Russell, Sarah Russell and Emily Meeker produced and offered to read to the court in support of the objections to said Master's Report the affidavit of Wm. C. GOUDY, in this cause, in which he swears, that he is one of the solicitors for the parties Emily Meeker, Sarah Russell and James Russell; that he is acquainted with the E ½ 12, 4 N. 2 E. &c., (part of the land described in petition and sold;) that the same is an improved farm with a dwelling house and other improvements, that the same is divided by a public highway and has been used and cultivated as two or more separate farms, and that the said premises are well adapted for two large and well improved farms, and in the opinion of deponent the said premises would produce a larger sum if divided in two parcels than if sold as one lot, and that the same is worth at least \$20 per acre; that the other parcels of land sold are disconnected with the said half section above described, and would sell in the market in separate parcels for a greater price than together;—that deponent has been informed by the Master in Chancery and other persons that certain persons had before the sale expressed a desire to buy parcels of the lands sold, and that some or all of such persons attended the sale for that purpose, and that the lands were put up and sold in one lot. That deponent has been informed and believes, and therefore states, that no person whatever desired to buy the whole of the premises, except the persons who bid them off, and that there was but one bid made, at which the property was struck off; that deponent has been informed and believes, and therefore states it to be the fact that this proceedings was commenced by Henry B. Evans and Solomon Strouse for the sole purpose of procuring a sale and bidding in the whole of the property, and that they did not desire a partition of the property; that in deponent's opinion great injustice has been done all the other parties except the two who have bid off the property, and in case the property was offered in parcels on a re-sale that a much larger sum could be realized.
- 35, 53. The said affidavit of said Goudy was offered as aforesaid after the announcement of the decision of the said court upon said exceptions, and the hearing of said affidavit was refused; and the court thereupon afterwards rendered a decree that the report of the said Master be approved and the said sale confirmed, and that the title of the said land be vested in the said purchasers.

The case comes to this court by writ of error, and the following errors are assigned:

 Lewistown



1st. The bill or petition did not present a sufficient case to authorize a decree.

2d. No exhibits of the title to the premises are made or presented.

3d. The verification of the bill or petition is not sufficient.

4th. There was not a sufficient answer for the defendants to authorize the decree and proceedings.

5th. The decree for partition, and also the decree for sale, were each erroneous, because not sustained by the proofs.

6th. James Russell was not awarded any share of the land, or proceeds of the sale.

7th. The oath of the commissioners was not such as required, and was not taken before the proper officer.

8th. The proceedings and report of the commissioners were erroneous, and not in conformity to the decree or statute.

9th. The decree for sale was not authorized in this case.

10th. The different tracts of land were sold *en masse*.

11th. The Circuit Court refused to consider the affidavit of William C. Goudy, on motion to set aside the sale.

12th. The Circuit Court erred in refusing to sustain the exceptions to the sale, and in refusing to set the sale aside.

13th. The Circuit Court erred in approving sale and rendering the final decree of investiture.

14th. The record and proceedings are otherwise erroneous, irregular and insufficient.

Goudy, Judd & Boyd,
Atty for Plff in Error.

Muker sal

Evans sal.

Abstract.

For Count.

13390

His Jan 7. 6
H. K. Kinner
A

*Gentry - the reasoning point is in the Sub
itself - See plot.*

Jameson & Morse's Print, 14 La Salle Street, Chicago

SUPREME COURT.

Second Division.

JANUARY TERM, 1861.

EMILY MEEKER ET AL., <i>Plaintiffs in Error,</i>	}	ERROR TO FULTON.
VS.		
HENRY B. EVANS ET AL., <i>Defendants in Error.</i>		

POINTS AND BRIEF FOR PLAINTIFFS IN ERROR.

BY GOUDY, JUDD & BOYD.

I.

This is a proceeding in Chancery, the address of the bill being to the Judge "in Chancery sitting."

Cost et al., v. Rose et al., 17 Ills., 276.

It also appears to be a bill in Chancery, because dower is assigned, which cannot be done under the statute for partition among tenants in common.

The complainants had their election to proceed in Chancery or under the statute, and having elected to proceed in Chancery, should have complied with Chancery rules and practice.

Cost et al. v. Rose et al., 17 Ills., 276.

II.

There are no sufficient allegations in the bill to authorize the decree for partition.

The bill alleges that James Russell is one of the "owners in fee-simple," &c.; that *he and his wife*, Sarah E. Russell, are owners of "one-ninth" of the real estate described. The bill also states that Moses Meeker, deceased, left certain "heirs at law, entitled to the next estate of inheritance," &c., among them, "James Russell and Sarah Russell, his wife." The decree for partition on proofs reported by the Master, and "other proofs taken in open Court," finds the "allegations set forth in the complainants' petition" to be true; and yet no share of the estate is awarded by the decree to said James Russell. It nowhere appears who the deceased Meeker's *children* were. *Non constat* but that Russell was a grandchild, and that he married his cousin, another grandchild, thus being an "heir at law," &c.

The decree for sale is liable to the same objections; for *James Russell* is ignored in the division ordered of the proceeds of the sale.

III.

The decrees exceed the prayer of the bill.

Farquer v. Farquer, 21 *Ills.*, 294.

IV.

If the proceeding is held to be under the Statute, by petition, &c., then the verification of the petition is not sufficient, first, because the oath is that the statements, &c., "*were* true;" and, secondly, because the deponent swears only as "to the best of his knowledge, information and belief."

Dyer v. Flint, 21 *Ills.*, 80.

King v. Haines, 23 *Ills.*, 340.

Frink v. Flannigan, 1 *Gilm.*, 38.

V.

Defendant Solanbarger's answer should have been sworn to.

Louvalle et al. v. Menard et al., 1 *Gilm.*, 43.

If a petition under the statute, then the decree ought to be reversed, because there are no exhibits of the title.

Rev. Stat., Title, Partition, §2.

VI.

The oath of the commissioners was insufficient in Chancery. And if the proceeding be regarded as under the statute, then the oath was not made before an officer required by law, the same having been taken before the Master in Chancery. The statute requires it to be taken "before the Court or some Justice of the Peace."

R. S., 1845, 401.

The oath has no date.

VII.

The report of the commissioners fails to show that they acted as required in Chancery cases. As instances, no proofs appear to have been taken, nor any sufficient examination of the premises, &c.

2 *Dan'l Ch'y Pl. and Pr.*, 1329, 1333.

VIII.

There is no authority "in Equity" proceedings for partition, for the Court to order a *sale* of land in any event. "Partition in Equity proceeds upon conveyances to be executed by the parties."

1 *Story's Eq. Juris.*, §652, &c.

2 *Dan'l Ch'y Pr.*, &c., 1326, *et seq.*

Thompson v. Hardman, 6 *J. C. R.*, 436.

DeLong v. Walker, 9 *Porter*, 497.

Turner v. Morgan, 8 *Vesey*, 144.

Pell et al. v. Ball et al., *Spear's Ch'y*, 530.

Same, 1 *Rich. Ch'y*, 373.

IX.

The Master offered and sold all the tracts of land together to Evans and Strouse, two of the complainants and tenants in common, *for less than half the value, without competition at the first bid*. They should have been offered separately, and the sale postponed.

Day v. Graham, 1 *Gilm.*, 436. 4 *Ib.*, 392.

Am. Ins. Co. v. Oakley, 9 *Paige*, 259.

McDonald v. Neilson, 2 *Cow.*, 177, 189.

The tracts in this case were lying separate and apart. The Court will take judicial notice of the government divisions of land.

Dougherty v. Purdy, 18 Ills., 206.

The tracts are correctly exhibited by a plat in the Abstract.

X.

If the foregoing positions are well taken, then the sale should have been set aside on the exceptions taken, as well as for other reasons, which are stated as follows :

1. The allowance of dower to the widow was unequal in quantity and value.

2. The property sold without competition to two of the complainants, on a single bid, for less than half the value.

3. The property was sold *en masse*, although susceptible of division, and other bidders desired to bid for part of the property, and attended the sale for that purpose.

Riggs v. Dickinson, 2 Seam., 441.

Miller - sal

ms,

Evans sal.

Ponts, re.

91

Filed June 18th / 61

L. Leland
to clerk

Heard 7. 61
W. C. May
C