No. 13698

Supreme Court of Illinois

Fridley et al

vs.

Murphy, Admr.

71641 7

SUPREME COURT,

SECOND GRAND DIVISION,

JANUARY TERM, 1861.

JOSEPH P. FRIDLEY, ET AL.
vs.
ABRAHAM MURPHY, Adm.&c.

POINTS IN BRIEF for Plffs in Error.

By GOUDY, JUDD & BOYD.

I. The notice of application, &c., was insufficient, no State being mentioned. The State will not be intended. Rowle's heirs v. Rouse, 3 Gil. 419.
Ondorff rel v. Stansberry, 20 Ills 90
Gill &c v. Noblet, 23 " 474.

II. The bill or petition does not show that all the personal estate had been exhausted—only the assets "in the hands of the administrator"—and does not show that he made a just and true account of the personal estate and debts &c. *Non constat* but there were impliments belonging to the estate, not in the administrator's "hands," to discharge the debts. R. S. (Wills Secs 103, 108.

III. There was no answer for the infant defendant, Louisa Fridley.

IV. The answer of the guardian *ad litem* admitted the allegations in the petition, but no proof was made sustaining the same.
McClay v. Norris, 4 Gil. 370.
Tuttle v. Garrett, 16 Ills 354.
Cost et al v. Rose et al, 17 Ills 276.

V. No Proof whatever was made of the allegatious in the bill; but the decree for sale is rendered upon the admission of the guard. *ad litem* and the failure of the adults to appear and answer. No decree can by the statute be rendered in this class of cases *pro confesso* and the evidence must appear in the record.
R. S. '45, (Wills) 558 Sec. 104. White v. Morrison, 11 Ills. 361.
Ward v. Owens et al, 12 Ills, 283. Cost et al v. Rose et al, 17 Ills 276.

VI. There was no sufficient notice of sale under the decree and statute. No notices were posted. R. S. 1845 (Wills) 106.
This Court will reverse for this reason notwithstanding the provisions of section 106, Rev. Laws 1845 p. 559. Reynolds v. Wilson et al 15 Ills 394.

VII. The several tracts of land were not offered separately at the sale, but were sold all together. Hence the sale should not have been approved.
Day et al v. Graham, 1 Gil. 433. Graham et al v. Day et al 4 Gil. 389.

VIII. The decree required all the tracts therein named eo be sold. Only a part were sold. The effect of this may have been that the tracts sold did not bring so much as they would had the decree been complied with. The administrator had no right to exercise a discretion and sell less than he was required to do by the decree. In this respect, therefore, it was error to approve the report of sale. R. S. 1845 (Wills) Sec. 104.
Reynolds v. Wilson et al. 15 Ills, 394.

IX. The terre tenants being parties to this proceeding this court on reversal will grant an order restoring Plffs in Error to the possession

of the portion of the land to which they are entitled.

Finley, et al.
vs.
Murphy, et al.

Points, &c.

Filed Sept 7th
1866

SUPREME COURT.

SECOND GRAND DIVISION.

January Term, 1860.

JOSEPH P. FRIDLEY, *et. al.*, Plaintiffs in Error, *VS.* ABRAHAM MURPHY, Administrator, &c., Defendant in Error.	ERROR TO FULTON.

ABSTRACT.

Page of Record,

1 This was a proceeding by bill presented by the defendant in error, as administrator of the estate of John Fridley deceased, to the Fulton circuit court, at the March term 1848, "in Chancery sting," for leave to sell real estate to pay debts.

A notice of which the following is a copy, duly certified to have been published for six weeks in a newspaper printed at Lewistown, Fulton County, Illinois, (the first insertion October 29, and the last Dec. 3, 1847,) was filed with the Clerk of said court March 16, 1848:

"ADMINISTRATOR'S NOTICE.

2 3 "Notice is hereby given to all persons interested in the estate of John Fridley deceased, that application will be made at the next term of the Fulton county circuit court, to be holden in Lewistown on the second Monday of March next, for an order for the sale of all or so much of the real estate of said deceased as will be sufficient to pay his debts, to-wit: the S. E. of the S. E. quarter of section 10, 5 N., 2 E.; the N. W. of the S. W. quarter of section 14, 6 N., 2 E; the E. half of S. E. quarter of section 15, 6 N., 2 E., and the E. half of the N. E. quarter of section 15, 6 N., 2 E.; when and where all persons interested in said estate may attend, and show cause (if any they have) why said property should not be sold for the purposes aforesaid." "Abraham Murphy, Adm'r."

2 3 The bill charges the appointment, in Oct. 1845, of said Murphy, by the Probate Court of Fulton County, Illinois, as Administrator of the estate of John Fridley deceased, and the qualification of such Administrator, "that within the time allotted "by law he filed in the Probate office of said county a full and perfect inventory of "the real and personal estate, together with an appraisement and sale bill of the "personal estate of said deceased"; that "the amount of debts and liabilities allowed "against said estate, aside from the cost of administration, amount to the sum of "$565,25 or thereabouts, and the amount of the assets in the hands of the adminis-"trator to be administered is $248,21 which entire amount has been paid out and "expended in part payment of the debts and liabilities of the deceased, leaving a "balance of debts to be provided for of $317,04"; that "said Fridley died leaving "Hester Fridley, his widow, and Joseph P. Fridley, Garret Ackerson, Latilia "Ackerson, Abraham Murphy, Emaline Murphy, Elizabeth Fridley, Henry Frid-"ley, Jesse Fridley, Maria Fridley, Louisa Fridley, and J. K. Polk Fridley, heirs "at law, whom he asks may be made parties to this bill"; that said Fridley died seized of the following described real estate, to-wit: S. E. S. E. 10; N, W. S. W. 14; E, half S. E. 15; and the E. half N. E. 15—all in township 6 N. range 2 E. And these are all the statements in the bill.

At the said March term of said circuit court a decrre appointing a guardian *ad litem* was rendered, as follows:

"State of Illinois, Fulton County. At the March Term of the Fulton Circuit Court A. D. 1848.

Abraham Murphy, Adm'r of John Fridley deceased, *VS.* Joseph P. Fridley, *et. al.*	Petition for sale of real estate.

4 5 It is hereby ordered that William Kellogg be appointed guardian *ad. litem* for Elizabeth Fridley, Henery Fridley, Jesse Fridley, Mariah Fridley, Louisa Fridley and James K. Polk Fridley infant defendants in this case and heirs at law of John Fridley deceased, and that said guardian ad litem report forthwith."

"N. H. Purple."

An instrument appears among the papers in said case which purports to be the answer of said guardian *ad litem* for all the infant defendants, except Louisa Frid-

5 ley, admitting the matters stated in the petition; but this paper has no filing upon it.

The following decree for sale appears of record as of the same March term, but the decree itself contains no filing upon it:

"Abraham Murphy, Adm'r of the estate of John Fridley dec'd, } Petition for sale
VS. } of real estate.
Joseph P. Fridley, *et al.*

This day again came the petitioner by his solicitor, and it appearing that the
5 6 guardian *ad litem* appointed herein having filed his answer for the minor heirs of said John Fridley admitting the facts in said petition, and the other defendants having failed to appear and answer, plead or demur to said petition, and due notice having been given—It is therefore ordered and decreed that the lands in said petition described, to-wit: S. E. of the S. E. 10, 6 N. 2 E.—N. W. of the S. W. 14, 6 N. 2 E.—E 1-2 of the S. E. 15, 6 N. 2 E., and the E. 1-2 of the N. E. 15, 6 N, 2 E. be sold at public vendue at the door of the court house in said county by said administrator he having first given notice of such sale as is required by the statute in such case made and provided, and that the same be sold on a credit of six months the purchaser securing the amount of such purchase money as the same may be sold for by personal security and executing to said administrator a mortgage of the lands so purchased, and that said administrator make such deeds as are necessary to convey the lands so sold to the purchaser or purchasers, and that he make report to this court at the next term hereof, to which time this cause is continued."

"N. H. Purple."

The decree of which the following is a copy bears no filing, but is spread of record.

A notice of sale and certificate of the publication thereof appear among the
7 papers, but are neither filed nor of record:

"ADMINISTRATORS NOTICE.

"Notice is hereby given that by virtue of a decree of the circuit court of Fulton County made and entered into at the March Term thereof, A. D. 1848, I will sell at the door of the court house in Lewistown, on Saturday the 3rd day of June next, to the highest bidder, on a credit of six months, the following described real estate, belonging to the estate of John Fridley dec'd for the payment of the debts of said estate to-wit: The E. half of S. of 15, 6 N. 2 E., also the E. half of N. E. 15, 6 N. 2 E. except one acre of the east side of the same, also 20 acres the South half of the South East of the South East of section 10, 6 N. 2 E. except one quarter of an acre off the East side of the same. The purchaser to give approved personal security with a mortgage on the premises sold. Abraham Murphy, Adm'r."

"I Hugh LaMaster, Editor and publishor of the Fulton Republican, a weekly newspaper published in the Town of Lewistown, Fulton County, Illinois, do certify that the annexed advertisement was duly published in said paper for six successive weeks the first insertion in the said paper dated April 21st 1848, and the last in the paper dated may 26th, 1848. H. La Master"

June 3rd, 1848.

And afterwards at the August Term of said circuit court, A. D. 1848, the following report was filed and the decree thereto appended, rendered:

"State of Illinois } At the August Term of the Fulton Circuit
Fulton County. } Court, A. D. 1848.

Abraham Murphy, Adm'r of John Fridley dec'd, } Pet. for sale of real estate.
VS. }
Joseph P. Fridley, *et. al.*

8 Abraham Murphy Adm'r of the estate of John Fridley dec'd reports that in conformity with an order taken at the last term of this court on his petition for the sale of real estate of which the deceased died seized, he did after giving the notice required by law, on the 3rd day of June A. D. 1848, at the door of the court house in Lewistown, between the hours of 10 o'clock a. m. and 4 o'clock p. m., I sold to William Phelps, at public auction for the sum of four hundred and thirty dollars the following described real estate (being a part of that described in said petition) to-wit: The East half of the South East quarter of section fifteen, also the East half of the North East quarter of section fifteen, except one acre off the East side of the same, also twenty acres the South half of the South East quarter of the South East quarter of section ten except one quarter of an acre off the East side of the same, all of said land being in township six North of range two East of the fourth principal meridian. That William Phelps the said purchaser has complied with the order of the court in securing to the Adm'r the purchase money, and further that I have made, executed and delivered to the said purchaser a good and sufficient deed to the land sold, all of which is respectfully submitted.

Abraham Murphy, Adm'r of John Fridley dec'd."

"State of Illinois, } In the matter of the Estate of John Fridley dec'd,
Fulton County. } Pet. for the sale of real estate.

9 This cause coming on again to be heard, and it appearing to the court that sale has been made according to law of part of the premises mentioned in said petition and decree. It is therefore hereby ordered and decreed that the report of the adm'r herein be approved and confirmed. N. H. Purple."

The foregoing constitutes the whole of the record and proceedings in this cause in the court below.

The case is brought to this court by writ of error, and the errors assigned are as follows:

1st. The court below had no jurisdiction.

2nd. The notice of the application and pendency of the suit was not sufficient.

3rd. The bill or petition did not present a sufficient case to authorize the circuit court to render a decree in the cause.

4th. There was no sufficient answer for the infant defendants to authorize the subsequent proceedings.

5th. There was no answer for the infant defendant Louisa Fridley.

6th. The circuit court erred in rendering the decree for sale.

7th. There were no proofs in the case on which to base the decree for sale.

8th. The decree for sale is informal and erroneous.

9th. No such notice of sale was given as required by statute and the decree for sale.

10th. The report of sale, &c., was not sufficient to authorize the final decree.

11th. The tracts of land were not offered separately at the sale, but were sold all together.

12th. The circuit court erred in approving the report of sale, &c.

13th. The record and proceedings are otherwise erroneous, irregular, informal and insufficient.

GOUDY, JUDD & BOYD,
Attorneys for Plaintiff in Error.

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Supreme Court

Joseph P Bridley vs

Abraham Murphy, Adm

abstract

3698

Filed Jan 3. 60

Wm A Jones

Clk