

8674

No. _____

Supreme Court of Illinois

John Lynch, et al,

vs.

John M. Rotan

71641  7

Pleas and proceedings had before
The Hon. Silas L Bryan in the Circuit
Court in and for the County of Marion and
State of Illinois in a certain cause here
before pending in said Court between John
M Rotan, Nancy H Johnson, Syceus Johnson her husband
and Cynthia Smith Complainants and John Lynch, Charles
W Smith and Solomon Smith surviving obligors of Willis Smith ^(decd)

Be it Remembered that on the 2^d day of December A D 1863 the above
named Complainants filed in said Court their Bill herein in words and figures ^{and} follow
"State of Illinois } Of the March Term of the Circuit
Marion County } Court A D 1864

To The Honorable S. L Bryan Judge of
your complainants John M Rotan Cynthia
Smith widow of Willis Smith decd Nancy H
Johnson & Syceus S. Johnson her husband Citizens
of the State of Missouri Humbly Complainings Showeth
that John M Rotan the ancestor of the said John M
Rotan departed this life about the year 1837 and left
the said Cynthia his widow and Byron Susan
Jane Nancy and John Rotan his children and
only heirs Further your complainants State that
subsequently the said Cynthia Mottin of said heirs
married one Mills Smith who became and
was appointed guardian for said heirs in
1847 by the Probate Court of Marion County
and entered into bond to the People of the State
of Illinois for the faithful discharge of his duties
as such guardian with John Lynch Charles

Court

100

Mr Smith Samuel H Craig (by a clerical
 mistake the name of said Samuel is spelled Simeon in
 Copy) Solomon Smith and John Hammonds
 as his securities in the penal sum of \$1200⁰⁰ dated
 22nd day of November 1847 All of which will
 more fully appear by a certified Copy of said
 bond herewith filed and marked Exhibit A
 together with a Copy of said order of appointment
 by the probate Court of Meannon County filed &
 marked Exhibit B

Amended bill in the case of John Mc Rotan
 Nancy Johnson and Sympson Johnson her hus-
 band and Cynthia Smith vs John Lynch
 Charles Mc Smith and Solomon Smith
 Commences at the conclusion of the first
 page of the original bill and then reads the
 following which is inserted for and in lieu
 thereof until the last page of the original
 bill the following to wit
 Your Orator further shows that there came to
 the hands of the said Willis Smith deceased
 moneys belonging to your Orator, as such
 guardian, the amount of \$458.38
 That in the said Willis Smith in his life time
 to wit 25th Jan'y 1848 made a pretended settle-
 ment in the probate Court of Meannon Co and
 falsely and fraudulently charged a gross
 sum as credits without distinguishing for

which one of said wards the expenditures were made of \$105.10 and deducted that aggregate sum from the sum of \$458.30 And further your orators aver and charge that in the same false and fraudulent settlement the said Willis Smith presented an item which was allowed of \$150.00 for a medical bill for services rendered to his said ward Nancy H. Rotan now Nancy Johnson and deducted that from the aggregate sum due to all the heirs his said wards then in his hands

And further your orators show that the said Willis Smith guardian as aforesaid in his life time on or about the 21st day of November 1849 before the probate Court of said Marion County made another pretended settlement wherein again instead of separating the shares of each of his ^{said} wards he charged himself with only the sum of \$338.90 and interest on same for one year \$37.27 a sum total of \$376.17 And at which last mentioned settlement the said Willis Smith as such guardian charged a commission of over thirty percent on the gross income of said wards.

Also for some pretended note and interest to one M. N. Hall to the amount of 2000 and pretended got the same allowed in his favor

4th

and pretended that the aggregate sum of only
\$344.60 cents was due at that date

All of which will more fully and at large ap-
pear by a copy of said Settlements herewith
filed and marked exhibit C & prayed to be
taken as a part of this bill

Your orators charge that the said note
to said Hall is fraudulent as to them
that they never gave such note & that
the said fees so charged for commissions
on the amount of the interest accrued
upon their said money was unconscion-
able and unjust - That his contemned
~~neglect~~ neglect to separate the shares of each ward
into distinct parts was a violation of duty
as guardian that the application of char-
ges in discrimination was unequal and
unfair

Your orators show further that said will
Smith named the mother of your orator
to wit of John Rotan & Nancy Johnson and
that thereupon he took your orators John
& Nancy and also the said Susan Jane and
Byron into his family and afterwards removed
out of the state of Illinois to Missouri and kept
your orators with him in his family as a part
of his family until he departed this life
about the year 1850 - That he left no property

80a in this state that your orators have discovered
and that he failed to make any other settlement
of his said guardianship

Your orators state further that Susan Jane Rotan
departed this life about the year 1834 a minor
and left no husband child or children
or descendants of a child or children surviving
her and that by force of the Statute in
such case made and provided the mother of
the said Susan to wit the said Cynthia
became entitled to $\frac{1}{5}$ th of her part of what
was then due to her and that her surviving
brothers and sisters become entitled to the
residue in equal parts among them
Your orators further state that they are informed
and believe it to be true that since the death
of the said Wm Smith the said Byron Rotan
has been paid by the said John Lynch Char-
les M Smith and Solomon Smith whom
your orators make defendants to this their
bill as ^{surviving} security on said guardians bond
all the other signers of said bond having
departed this life

Your orators charge that upon a just and
fair account being taken of what shall
be due to your orators in the premises
it will appear that at least fifty Dollars
is due to the said Cynthia and that to
your orator John Rotan there is due the

Amount of upwards of one Hundred and thirty Dollars, and to the said Mary Johnson and Syngue Johnson over ninety Dollars, the precise sum, dependant upon the reputation of the fraudulent and unjust charges of the said Mill is so erroneously made against his said wards and upon the computation of interest.

And the said Complainants aver that they brought this suit for discovery & to recover all vouchers, accounts and charges and settlements which said Miller as guardian has ever made and to release themselves from fraudulent claims allowed to him as such guardian on his pretended settlements, which all but the said parties were unable and unable to protect and defend their rights - That they desire to avoid multiplicity of suits - That in a court of law they cannot so fully as in equity adjust and repair the said vouchers and accounts.

Your Orators charge further that no payment has been made to them or either of them of any part due from said guardian in his lifetime.

nor since the death of said grand
 dean of said fund which came to
 his hands as guardian except about
 \$10 paid to the said John Rotan since
 the same monument of this suit by
 the said defendant Geyre
 And in consideration that your Compts
 have often requested said depts to pay the
 same and that they have utterly refused
 contrary to equity and because your Comrs
~~respectively~~ have not adequate relief
 except in a Court of equity when not
 then after kind am Cognizance your
 orators pray process against said
 defendants and that they be made
 to answer each of the allegations in
 this bill & the being expressly waivered
 to said answer and that upon proof
 of the allegations in said bill on the
 hearing an account be stated and
 a decree returned in favor of said
 complainants for the amounts which
 respectively may be found due from
 said depts to said complainants &
 and that your Complainants have such
 other relief as shall seem meet to
 your Honors

John de Rotan Captain Sheriff
 Murray Johnson & his heirs

By Omlung & Merritt Solrs 10/11

gan

State of Illinois } In the Merion County
Merion County } Circuit Court AD 1865

John M Rotan
Nancy H Johnson

& George John Smith husband

& Cynthia Smith

} Bill in Chy

vs
John Lynch
Charles M Smith
Solomon Smith
Surviving obligors

I do hereby enter myself plaintiff
for costs in this cause and acknowledge
myself bound to pay or cause to be paid
all costs which may accrue in this
action either to the opposite party or to
the officers of this Court in pursuance
of the laws of this State

Dated this 12th day of December AD 1865

J. M. Rotan Jas
J. M. Oglesby Jas
J. R. Anderson

State of Illinois } The People of the State
County of Merion } of Illinois to the Sheriff of
said County greeting

We Command you to summon John Lynch
Charles M Smith Solomon Smith Surviving
obligors of Miller Smith deceased & to find

in your County to appear before the Circuit Court
of Marion County on the first day of the next
Term thereof to be holden at the Court House
in Salem on the third Monday in the month
of March next to answer Solomon McRistan
Nancy H Johnson & Elizabeth Johnson
his husband & Agatha Smith in their
Bill to settle account of guardianship
&c and bring forth due return to our
said Court as the law directs
Witness Jacob O'Chance clerk of our
said Court and the seal thereof at Salem
this 2nd day of December A.D. 1863.

Stamp 50 cents J. O'Chance Clerk
and County, *Seal*

Exhibit A

Know all men by these presents that we Willis
Smith John Lynch Charles M Smith Samuel
McCrain Solomon Smith and John Hancock
of the County of Marion and State of
Illinois are held and firmly bound unto
the People of the State of Illinois in the
penal sum of Twenty Hundred Dollars
current money of the United States which
payment will and truly to be made
and performed we and each of us had
ourselves our heirs executors and ad-
ministrators jointly severally and firmly
by these presents

Witness Our hands and seals this 19th day
of November A D 1867.

The Condition of the above obligation is such
that if the above bounden Miles Smith
who has been appointed Guardian for
Nancy Rotan Susan Jane Rotan
Byron Rotan and John Miner Rotan
heirs of John Miner Rotan deceased
shall faithfully discharge the office
and trust of such Guardian according
to law and shall render a fair and
just account of such Guardianship
to the Court of Probate for the County of
Manion from time to time as he shall
be thereto required by said Court and
comply with all the orders of said Court
lawfully made relation to the goods
chattels and moneys of such minors
and make and pay to such Minors all
moneys goods and chattels with papers
and effects which may come to the
hands or possession of such Guardian
belonging to such minors when such
Minors shall be thereto entitled or
to any subsequent Guardian should
the Court so direct then this obligation
to be void otherwise to remain in
full force and virtue

Bond taken and approved by me the 22nd day of March 1847

A. H. Farris P. S.

Mills Smith Esq
John Lynch Esq
Charles M. Smith Esq
Samuel H. Craig Esq
Solomon Smith Esq
John M. Munn Esq

State of Illinois } ss.
Madison County }

I Dwyer Tracy Clerk of the County Court in and for the County and State aforesaid do certify that the foregoing is a true copy of a bond given by Mills Smith as guaranteed the same on file in my office

Given under my hand and seal of office at Salem this 21st day of Dec 1863

Seal

Dwyer Tracy Clerk

* It is ordered that the said Guardian enter into settlement of the Estate of said Munn with the Court

4

Exhibit C

Guardianship Maria Heirs of John M. Rotan deceased Probate Office and Court special term January 20th 1848 And now at this day Mills Smith Guardian of the Munn heirs of John M. Rotan deceased comes into Court and moves the Court for a settlement herein whereupon it is ordered - That said Guardian

* Witness the said Mills Smith Guardian as of former

12

as aforesaid acknowledges himself indebted to said estate in the sum of fifty Dollars received by him on the 10th day of September A.D. 1847 and the further sum of three hundred and seventy eight Dollars thirty and one half cents received by him on the 30th day of November A.D. 1847 making the total sum of \$458 ³⁰/₁₀₀ Four hundred and fifty Eight Dollars thirty and one half cents

Orders that the said Guardian be allowed the sum of \$600 for his services and expenses in going there to the state of Tennessee on the business of said Estate - The said Guardian then exhibited in court and filed the following receipts - To W. W. Pace clerk the sum of \$200 To William Little clerk of White County Court Tennessee \$337 ¹/₂ To J. Cunningham and Marshall the sum of 31.09 To W. A. Marshall the sum of \$1.75 - To R. M. E. Coan the sum of \$240 Making in all of the credits to which said Guardian is entitled the sum of \$1,021 ⁶⁰/₁₀₀
 Done in office this 25th day of January 1848 also for Nancy A. Rotam for

Medical bill \$500 - Amos R Farris
 Probate fee 2.50 P.S.A.
 Probate Office & Court special term Nov 21
 1849

And now on the day comes in to Court
 Willis Smith Guard of the minor heirs of
 John Mc Rotan deceased and moves the
 Court him for a settlement of his assets
 as such Guardian and on ex
 amination we find that after deduc
 ting all credits there is standing
 against said Guard the sum of \$338.90
 \$338.90

Interest on the sum for one year &
 ten months 37.29
 Making Principal & Interest up to Nov 21st 1849 376.19
 Deduct from 31.57
 Bal due 344.62

Guardian fees 10.00
 Note & due to other 20.00
 Hall ^{50c} net .50
 Probate fee .75
 30.82
 34.57

Willis Smith Guardian
 Done in Office this 21st Nov 1849
 H. K. Farris
 Probate Justice

State of Illinois } ss
 Marion County } I Dwyer Tracy Clerk of the County
 Court in and for the County and State aforesaid do
 hereby Certify that the foregoing is a true copy of Return
 of Guardian settlement as filed in my office of Willis Smith
 Guard of heirs of John
 Mc Rotan
 done under my hand and seal of office at Salem this 15th day
 of March 1849
 Dwyer Tracy Clerk

50
 Stamp
 Seal
 1849-50

Probate Office and Court November 19 A.D. 1847
 And now at this day comes Miles Smith
 and represents to the Court that Nancy Rotan
 Susan Jane Rotan Byron Rotan and John
 Minor Rotan are minors without Guardians
 and that they have an estate in the County of
 White and State of Tennessee which requires
 to be protected and preserved for their use
 and benefit and the said Nancy Rotan
 and Susan Jane Rotan being over the
 age of fourteen years and being in open
 Court in their own proper persons made
 choice of Miles Smith for their Guardian
 Whereupon ordered that the letters of Guo-
 dianship be assigned to the said Miles
 Smith as such Guardian Ordered that
 be the said Miles Smith enter into Bond
 with good and sufficient security which
 was accordingly done with John Lynch
 Charles McEachern Samuel H. Craig
 Solomon Smith and John Harmon, &
 as such securities - ordered that the
 said Bond be recorded and filed in the
 office - Done in Office the 19th day
 of November A.D. 1847

E. H. Smith

A. K. Lewis Probate Judge

State of Missouri ss.
 Mann County J. Dwyer Tracy clerk of the

County Court in and for the County and
State of Missouri do hereby certify that the
 foregoing is a true copy of the order of the
 appointment of Mills South guardian
 of the above named being as of record
 the same on file in my office

Given under my hand and seal
 of office at Salem this March 15 1865

Stamps &
Seals

John Tracy
Clerk

Order on Page 565 Books and
Return et 27 March 1864
Tyrone Smith et al 3 day

And now comes the said complainant
and excepts to the answer filed by said
1st ~~Defendant~~ said answer is unlawful whether
it be a demurrer or an answer

2 The said answer purports to be a demurrer
in part and an answer in part

3 The said Answer in its subject matter is
a demurrer to the whole bill and also
purports to be an answer to the whole of
the bill

Ormelung & Merritt
for complainant

16
Answer to amended bill

State of Missouri } Circuit Court August 7
Marion County } 1864

John W. Polan Nancy Johnson &
Syngus Johnson her husband & Catharine
Smith - } Amended Bill in
} Charles W. Smith

John Smith Charles W. Smith }
Polanna Smith }
attorneys

The joint answer of Charles W. Smith
and Polanna Smith to the amended bill
of complainant of complainant to
these respondents having and reserving
to themselves all advantages of exceptions
that may be had or taken to the complain-
ant's amended bill for us appearing
for want of jurisdiction in a court of
equity to take cognizance of the mother's
complaint of in said bill and therein
for answer thereto or to so much as
they are advised are material or
necessary to make answer unto answer-
ing say - deny that there is any thing
due the complainant or said guardian
and upon the several principles
these respondents have no knowledge
of the alleged petitions but believe they

are correct and these respondents refuse by
 deny the charges of fraud and errors
 charged to have been committed by the
 principal in said bond as set up in
 Complainant's amended bill
 These respondents however, in no appearance
 a fraud or mistake on the part of the
 said Guardian in Exhibit marked C,
 filed by Complainant and others in the set-
 tlement of 1847 or 1849 nor did the Com-
 plainants, Roberts, when he filed the
 original bill but said charges have
 been insisted since a decree was
 sustained to the said original bill
 but said fabricated charges will not
 avail Complainants for they are matter
 true in law and fact

The Probate Court which approved of
 said settlement was satisfied of the
 correctness and was doubtless fully
 advised in reference to all the
 items submitted in such settlement
 and after a lapse of fifteen or seventeen
 years and after the Guardian is dead
 and no one living who knows in refer-
 ence to such matters - It is too late for
 the first time to seek to attack their
 accuracy and these respondents plea-
 ston now they are not subject to

re-examination no reason having been
 shown why the Complainants have delayed
 so long to seek a re-examination of
 capt that they wished to wait until
 all were dead who could be introduced
 to establish their accuracy - The
 Respondents deny that it was necessary
 to have ~~introduced~~ introduced the fact
 in a court of equity to show protection
 a multiplicity of suits at law they
 deny that Complainants cannot
 in a court of law so fully as in a
 equity adjust and examine the books
 & accounts and every part of that affair
 no reason to sue in equity

The Respondents deny that any discovery
 is sought by Complainants amended bill
 that an answer under oath is expressly
 waived by Complainants

The Respondents insist that the title
 must made by the said guardian
 are fair right honest and legal and
 can not in a suit against the Respon-
 dent be re-examined and if so the juris-
 diction of this Court can not be sustained
 as a general principle was rightly
 sustained to the original bill all
 the allegations in Complainants amend-
 ed bill are hereby denied and proof
 called for

These respondents set up the same defence
 as to the amended bill as they did to
 the original bill and they pray that
 their answer to said original bill
 excepting that part which attacks
 the sufficiency of said original
 bill similar to a defence be taken
 as part and parcel of their answer
 to the amended bill and all the
 part of such first answer that
 succeeds the cross marked in the
 margin of the second page of said
 first answer be and is hereby made
 a part and portion of their answer
 to the amended bill without rep-
 etition and the said respondents
 having answered fully ~~responding~~
 pray to be hence dismissed &
 Costs & charges

To be for Receipts & Receipts
 Filed August 16th 1864 J. D. Chace Clerk
 Replication Filed August 26th 1864
 J. D. Chace Clerk

John Mc Rotan et al }
 vs } Bill in Chancery
 John Lynch et al }
 And the said complainants come and for
 replication say that so far as the same
 is deemed to said Bill the same is

irregular and so far as said account
 during the allegations in said bill the
 said account is not true
 And that the said bill is true and cor-
 rect as he will prove when for the
 Obedience & Merit
 for Pff

Bond for ~~Capital~~ Filed April 15th
 1865 H.C. from etc by D. Chance Dept
 Know all men by these presents that we John
 Lynch Charles M. Smith Solomon Smith
 and William E. Middleton and Thomas
 C. Smith an held and firmly bound unto
 John M. Rotan Nancy A. Johnson and
 George Johnson her husband and
 Cyathus Smith in the full sum
 of seven hundred dollars ^{700⁰⁰}
 lawful money of the United States,
 for the payment of which well and
 truly to be made we bind ourselves our
 heirs executors and Administrators
 jointly severally & firmly by these pre-
 sents Witness our hands and seals this
 9th day of April A.D. 1865

The Condition of this Obligation is such that
 whereas the above named John M.
 Rotan Nancy A. Johnson and George
 Johnson her husband and Cyathus

21 And Cynthia Smith recovered a decree
in Chancery at the March Term of the
Marion Circuit Court A.D. 1865 against
the above bounden John Squash Charles
Mc Smith & Solomon Smith bearing
obligations of Miller Smith deceased for the
sum of five Hundred and ninety seven
dollars from which decree the said
Squash and Smith have taken their ap-
peal to the Supreme Court of the State
of Missouri to be held in November next
And if the said Squash & Smiths appeal
be not shall well and truly pay the judgment
appealed from and all costs interest and
damages ^{incurred in said case and that may accrue} thereon in case the
said judgment shall be affirmed
and shall duly and diligently proce-
cute said appeal then this obligation
shall be void otherwise to remain in
full force

Approved by me this
15th day of April
1865

H.C. Moom Clerk

By J.O. Chew Esq. W.E. Middleton

John Squash Esq.

By B.B. Smith of

Charles Mc Smith Esq.

Sol Smith Esq.

Thomas C. Smith

22

Deem

John Rotan, Nancy H. Johnson }
Sydney Johnson her husband } Bills in Chancery
Cynthia Smith } for account

John Lynch Charles M. Smith }
and Solomon Smith Surviving }
obligors of Willes Smith dec'd }

And now comes the said complainants the
said defendants come by B. B. Smith their
factor And this case having been at the last
term set for hearing at this term on bill an
own replication and proof of the said case
is now submitted to the Court for final
hearing - Wherefore the complainants
submitted proof without objection a bill
levied of the proceeds in 1849 in the
Probate Court of Meacon whereby it ap
pears that at that date the sum of \$344⁰⁰
was then due to said complainants
except so much as was due to Byron
Rotan and his share of estate of Susan
Rotan dec'd And the said defendants hav
ing failed to show any payments thereof
by the evidence on their behalf as to the
share of the said complainants - It is
ordered adjudged and decreed that
said complainants do have a decree

against the said debts for the sum of
\$597⁰⁰

Errors Assigned

- 1 The Court Erred in refusing to dismiss bill in this case because the Compt has an adequate and clear remedy at Law
- 2 The Court Erred in rendering a decree for Compt because they proved no fraud
- 3 The Court Erred in rendering decree for complaints and refusing to dismiss bill because they proved no fraud against these defendants
- 4th Because there is no fraud alleged against defendants
- 5 Because the Court decreed in favor of the portion of the fund to which Susan Rotan was entitled at her death without making her Adversely affected a party to the bill
- 6 Because all the parties in interest in the suit were not before the Court The administrators of Willy Dunette and John Hammon and Samuel Craig Co obligors of defendants were necessary parties to the bill
- 7 Decree is excessive
- 8th Decree is in violation of formal and defect

B B Dunette
for appellants

For respondents

NK S. D. Meberg
for respondents

43

John Lynch et al

Appellants

vs

John McRatan

et al

Filed Nov. 8. 1865.

At Johnston Ct

Paid by Smith \$5.00

John M Rotan Nancy H Johnson
& Lycurgus Johnson his husband
and Cynthia Smith

vs

John Lynch Charles M Smith
and Solomon Smith surviving
obligors of Willis Smith deceased

Bill in
Chancery
for an account,

And now
at this day to wit Saturday April 1st 1865
come the said complainants by O'Melveny and
Merritt their Solicitors and the said defend-
ants come by B B Smith their Attorney
and this cause having been at the last
Term set for hearing at this Term on Bill
answer replication and proof. The said cause
is now submitted to the court for final hear-
ing. Whereupon the complainants submit
in proof without objection a settlement of
the purchase in 1849 in the probate Court
of Marion County. Whereby it appears that at
that date the sum of \$344⁰⁰/₁₀₀ was then due to
said Complainants except so much as was due
to Byron Rotan, and his share of estate of Susan
Rotan decd. And the said defendants having
failed to show any payment thereof by the evi-
dence on their behalf as to the shares of the said Com-
plainants. It is ordered adjudged and decreed
that said Complainants do have a decree again-
st the said defendants for the sum of \$597⁰⁰

to wit the sum of \$255.70 to John M Rotan \$255.70
to Nancy Johnson and George Johnson her
husbands and the sum of \$85.50 to Cynthia
Smith, or their legal representatives with inter-
est thereon from the rendition of this decree at
the rate of six percent until paid being the am-
ount of said settlement with six percent less the
share of Byron Rotan which is not included
in this decree. And it is further ordered ad-
judged and decreed that the said complainant
recover their costs in this behalf expended and
that this decree be executed by a special ex-
ecution on this decree issued under the seal
of this Court to the Sheriff &c

State of Illinois
Marion County

J. Henry Moore Clerk
of the Circuit Court in and for said
County and State aforesaid, do hereby certify
that the foregoing is a true and correct copy of
the decree of our said Court, in the above entitled
cause as appears of Record in my office.

Witness my hand and
Official Seal this 11th
Day of November A.D. 1865
H. C. Moore Clerk

State of Illinois)
Marion County)

We the undersigned
B B Smith attorney for the
Appellant and H K E O'Meloney attorney for
the appellee do here agree that the foregoing
is a true and perfect copy of the original
decreed in the above entitled cause as entered
of Record in the Marion Circuit Court and that
the Record in this cause is imperfect in not
setting out the same fully. Now therefore we
agree that this be made and taken a part
of the Record, and so considered

Given under our hands and seals
this 11th day of November 1865

B B Smith Seal
atty for Appellant

O Meloney Seal
atty for appellee

No 43

John W. Rolan

et al

vs

John Lynch

et al

Paper Copy of

Deeds

8674

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

NOVEMBER TERM, 1865.

JOHN LYNCH, *et al.*, Plaintiff in Error, }
vs. } Error to Marion.
JOHN M. ROTAN, Defendant in Error. }

BRIEF OF DEFENDANTS IN ERROR.

- I. A party injured should have the right to select, according to his own judgment in the matter, for his tribunal, such a one as would give him a complete remedy, and though the plaintiff has a remedy at law, if that remedy does not appear as clear, and is doubtful, and not as *effectiee*, chancery will exercise a sound discretion in assuming it. Mason vs. Piggott, 11 Ill. R. 89; Truett vs. Wainright, 4 Gil. R. 418.
- II. Then only Courts of equity will refuse to take cognizance of a cause, when the complaining party has a remedy at law, clear, complete and effective. Frazier vs. Miller, 16 Ill. 50.
- III. Courts of equity have a paramount jurisdiction in the cases of administration and cases of settlement of estates, and have also a similar and *plenary* jurisdiction over the persons and estates of infants, and will in the exercise of that jurisdiction, cause to be done whatever may be necessary to preserve their estates and interests; and it would seem to us that in this cause, arising from the maladministration of the funds of infants, chancery would assume jurisdiction if the remedy at law even appeared clear. 1 Story's Eq. Jurisp. ch. 9; Willims on Ex. pp. 1239, 1240; 2 Story Eq. p. 35; Cowls vs. Cowls, 3 Gil. R. 435; Grattan vs. Grattan, 18 Ill. 171.
- IV. In cases of fraud Courts of chancery have always jurisdiction, (Truett vs. Wainwright, 4 Gil. 418,) and from the settlement of the guardian as it was made by him, it is plain it was a legal fraud, whether we insisted upon it or not in the final decree.
- V. The law does not favor a multiplicity of suits, and if it is the object of a bill in chancery to prevent this by having the rights of the party at once adjusted and determined by a Court of equity, instead of suffering the parties to be harrassed by a number of separate suits, chancery would assume jurisdiction. Mitford's Eq. Pl. 145, marg. p.

O'MELVENY & MERRITT,

Attorneys for Defendants in Error.

Lynch 43

vs,

Kotau

Deft's Brief

Filed Nov 9/65
A Johnston
Clerk

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

JOHN LYNCH, *et al.*,

vs.

JOHN M. ROTAN, *et al.*

} Error to Marion County.

Page

ABSTRACT AND POINTS FOR PLAFFS IN ERROR.

This was a bill in chancery brought by complainants against defendants as security of Willis Smith, deceased, as guardian of complainant's, John M. Rotan, Nancy Johnson, Lycugus Johnson, her husband, and by Cynthia Smith, widow of Willis Smith, and mother of complainants, and praying for an account to be rendered by appellants as securities of Willis Smith.

1 Complainants state that John M. Rotan, their father, died in 1837, and left said Cynthia, his widow, and Byron Rotan, Susan Jane, Nancy and John Rotan, his children. That Cynthia, their mother, married Willis Smith, who was appointed their guardian in 1847, and gave his bond with John Lynch, Charles M. Smith, Samuel Craig, dec'd. Solomon Smith and John Hammers dec'd. as securities in \$1200 penalty. Refer to exhibit "B."

2 That monees of said orators came to Willis Smith as guardian to the amount of \$458 30. That said Willis, as guardian, on the 25th Jan'y, 1848, made a fraudulent settlement with the probate court of Marion and falsely charged a gross sum as credits, without specifying for which one of said wards expenditures were made of \$105 10, and deducted that amount from \$458 30, and fraudulently presented \$15 for medical bill rendered Nancy Rotan, now Johnson, which was allowed and deducted from the whole sum of wards. That in November, 1849, said Willis made another settlement in the said probate court, and instead of separating each share of said wards, he charged himself with only \$338 90, and interest on same for one year, \$37 20, total \$376 17, and charged a commission of over thirty per cent. on the gross sum of said wards.

4 Also for note and interest to M. W. Hall, \$20, which was all allowed to him, and got only \$344, as charged to him. Refer to exhibit "C."

5 Charges said note is fraudulent; that said commission was unreasonable and unjust; that his neglect to separate each share was a violation of duty; that his making charges in gross was not fair; that he, Willis, married said Cynthia, mother of said children, and took them to Missouri and kept them till he died in 1850. Left no property in this State and made no other settlement.

5 That Susan Jane Rotan died in 1854; left no husband, or child, nor descendants; and that Cynthia, her mother, became entitled to two-fifths of her part of the estate of John Rotan, and her brothers and sisters were entitled to residue. That Byron had been paid his share by defendants. That John Lynch, Charles M. Smith and Solomon Smith are surviving obligors in bond that Samuel Craig and John Hammers are dead; that fifty dollars are due Cynthia, to John \$130, to Nancy, \$90 due when the fraudulent charges are rejected.

- 6 That suit is brought for discovery and to re-examine all vouchers and
 accounts and settlements of said Willis, and to relieve against fraudulent
 claims on his settlements, and to avoid multiplicity of suits: that no payment
 has been made them of what was due them by said Willis or said defendants,
 but \$10 paid John Rotan; prays that after proof an account be taken and
 decree for their respective amounts due them.
- 7
- 8 Cost bond.
- 9 Summons.
- 10 Guardian's bond.
- 11 Exhibit "C." Copy of orders of court and settlement of guardian.
- 12 Exhibit "B." Copy of orders of court and settlement of guardian.
- 13 Compl'ts exception to defendants' answer.
- 14 Answer of defendants.
- 15 Deny that anything is due compl'ts on said bond, Denies defendants
 have no knowledge of alleged settlements. Expressly denies all charges of
 fraud by said guardian.
- 16
- 17 See no fraud in exhibit "C," in settlement of 1847 or 1849. That said
 charges of fraud in fact or law. The probate court was satisfied that they
 were correct. Says it is too late after guardian has been dead 15 years to
 review. That not subject to be re-examined. Deny that compl'ts cannot
 have adequate remedy in a suit at law.
- 18
- 19 Deny that discovery is sought that answer under oath is expressly
 waived. Says the settlements are fair and a suit in equity cannot be sus-
 tained. That compl'ts deny all charges of fraud and demand proof.
- 20 Replication.
- 21 Appeal bond filed.
- 22 Cause heard and bill answer and replication.
- 23 Decree for said defendants, \$597.

ERRORS ASSIGNED.

- 1st. The court erred in refusing to dismiss bill in this cause, because complainants have adequate remedy at law.
- 2d. The court erred in rendering decree for complainants, because they proved no fraud as to the guardian.
- 3d. The court erred in rendering decree for complainant and refusing to dismiss bill because they proved no fraud against these defendants.
- 4th. Because there is no fraud alleged against said defendants
- 5th. Because the court rendered a decree for complainants for the portion of the funds of Susan Jane Rotan, deceased, without showing an administration or her estate.
- 6th. Because all the parties in interest were not before the court. The administrators of John Hammons and Samuel Craig, dec'd, who were co-obligors of defendants, were not made parties to the suit.
- 7th. Because decree is excessive.
- 8th. Decree is uncertain, informal and defective.

B. B. SMITH, for Appellants.

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

JOHN LYNCH, *et al.*, Appellants, }

vs.

JOHN M. ROTAN, *et al.* Appellees. }

PLFFS POINTS AND AUTHORITIES.

1. Appellants surviving obligors of bond of Willis Smith dec'd. as Guardian of John M. Rotan, Nancy Johnson, formerly Nancy Rotan, Byron Rotan and Susan Jane Rotan, children of John M. Rotan, dec'd, made their guardian bonds with John Hammers dec'd and Samuel Craig dec'd as securities of Willis Smith dec'd, guardian of said children. The said bond was payable to the People of the State of Illinois. Appellees charge fraud as the ground by said guardian in settlement with Probate Court in this, that he made overcharges and improper charges, and has not paid balance due in his hands. For all the grievances alledged in complainant's bill they had a clear and adequate remedy at law on securities bonds. Courts of equity will not relieve when there is a clear and adequate remedy at law. Story's Equity Pleading, 373; Sterne vs. Mannamay, 2d Scam. 351.

2d. The bill pretends to seek discovery of appellants, but expressly waives their oaths. A bill of discovery must ask an answer under oath. Story's Equity Pleading, sec. 311. If discovery is asked and fails, the bill ought to be dismissed. 1st Gil. 210. Appellee obtained no discovery therefore bill ought to have been dismissed.

3d. Relief is asked in equity in this case on the ground that the guardian committed fraud in making settlement with Probate Court. No evidence of fraud is shown by appellee, and if it be held that guardian committed fraud there is none proven against these def'ts. Fraud must be proven. The court cannot infer it. Wright vs Grover, 27th Ills. 430. To constitute fraud there must be an intention to deceive. 1st Scam. 500.

4th. Bill does not allege fraud against def'ts. To give the court jurisdiction over them on the ground of fraud they must be alleged to have participated in it.

5th. The court erred in rendering decree for compl'ts for Susan Jame Rotan's interests in the fund, of which she died seized. Her administrator should have been a party to the bill. Personal assets do not vest immediately in the heir, but they do vest in the executor or administrator. 2d Blackstone page 429 and note 38. *Williams Executors page 527*

The administrator of Susan Rotan was a necessary party to the bill. Edwards vs Parton, 107, 128, Story's Equity Pleadings, sec 170, page 217. *Note N.*

6th. The administrators of the co-obligors of appellant, John Hammers and Samuel Craig dec'd are necessary parties to the bill. Story's Equity Plead sec 170, 172, 173, 174, page 219.

Want of parties to a bill may be raised at the hearing, 1 Baile Chy. Practice.

7th. The decree is excessive, as there is no proof of fraud in allowing charges on settlement in 1849. The amount due to compl'ts if entitled to decree, after deducting the sum of Byron Rotan, which is paid, is \$511,61.

B. B. SMITH, for Appellants.

The Court do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears by the records of the Court in the case of *John Lynch et al vs John M. Rotaw et al* do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears by the records of the Court in the case of *John Lynch et al vs John M. Rotaw et al*

Attest my hand and seal of office this 9th day of November 1865
 J. W. Johnston
 Clerk of the Court

The Court do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears by the records of the Court in the case of *John Lynch et al vs John M. Rotaw et al* do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears by the records of the Court in the case of *John Lynch et al vs John M. Rotaw et al*

Attest my hand and seal of office this 9th day of November 1865
 J. W. Johnston
 Clerk of the Court

43
 John Lynch
 et al
 vs
 John M. Rotaw
 et al
 vs
 John M. Rotaw
 et al

Filed Nov 9/65
 W Johnston
 Clerk

NOVEMBER 1865

THE CLERK OF THE COURT

THE CLERK OF THE COURT

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

NOVEMBER TERM, 1865.

JOHN LYNCH, *et al.*, Plaintiff in Error, }
vs. } Error to Marion.
JOHN M. ROTAN, Defendant in Error. }

BRIEF OF DEFENDANTS IN ERROR.

- I. A party injured should have the right to select, according to his own judgment in the matter, for his tribunal, such a one as would give him a complete remedy, and though the plaintiff has a remedy at law, if that remedy does not appear as clear, and is doubtful, and not as *effective*, chancery will exercise a sound discretion in assuming it. *Mason vs. Piggott*, 11 Ill. R. 89; *Truett vs. Wainwright*, 4 Gil. R. 418.
- II. Then only Courts of equity will refuse to take cognizance of a cause, when the complaining party has a remedy at law, clear, complete and effective. *Frazier vs. Miller*, 16 Ill. 50.
- III. Courts of equity have a paramount jurisdiction in the cases of administration and cases of settlement of estates, and have also a similar and *plenary* jurisdiction over the persons and estates of infants, and will in the exercise of that jurisdiction, cause to be done whatever may be necessary to preserve their estates and interests; and it would seem to us that in this cause, arising from the maladministration of the funds of infants, chancery would assume jurisdiction if the remedy at law even appeared clear. 1 *Story's Eq. Jurisp.* ch. 9; *Willims on Ex.* pp. 1239, 1240; 2 *Story Eq.* p. 35; *Cowls vs. Cowls*, 3 Gil. R. 435; *Grattan vs. Grattan*, 18 Ill. 171.
- IV. In cases of fraud Courts of chancery have always jurisdiction, (*Truett vs. Wainwright*, 4 Gil. 418,) and from the settlement of the guardian as it was made by him, it is plain it was a legal fraud, whether we insisted upon it or not in the final decree.
- V. The law does not favor a multiplicity of suits, and if it is the object of a bill in chancery to prevent this by having the rights of the party at once adjusted and determined by a Court of equity, instead of suffering the parties to be harrassed by a number of separate suits, chancery would assume jurisdiction. *Mitford's Eq. Pl.* 145, marg. p.

O'MELVENY & MERRITT,

Attorneys for Defendants in Error.

same deed in 1954

Does not include
John Rolan's share or that
of his heirs etc

Sept 1865

Book 413
v.

Rolan

Sept Brief

Filed Nov 9/65
Johnston
Clerk

IV

V

VI

VII

VIII

IX

X

XI

XII

XIII

XIV

XV

XVI

XVII

XVIII

XIX

XX

XXI

XXII

XXIII

XXIV

XXV

XXVI

XXVII

XXVIII

XXIX

XXX

CIVIL ARCHIVE & MISCELLANEOUS

Deposited for reference in 1900