No. 8541

Supreme Court of Illinois

Holladay

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vs.

Dixon

71641

Points and Authorities Relied upon by R. S. Nelson, for Plaintiff in Error.

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1. By the Rev. Stat. 1845, p. 105, it is provided there must be express words used by the Devisor to limit the Estate to less than a fee—otherwise when an estate is devised or granted, it shall be intended to be a fee. Jones and others vs. Bramlet, 1 Scam. 281. But here are *express words* used, *"never to her and her heirs forever,"* and taking the latter clause of the will, it clearly appears to be the intention of the testator to limit the estate devised as to the defendant's wife. See will, on page 11 of the record.

2. Whatever may be the strict grammatical construction of the words of a will, that is not to govern if the intention of the testator requires a different construction. Thelluson vs. Woodford, 4th Vezey Jun. 311; Sims vs. Doughty, 5 Vezey Jun. 246, and note 1 to page 246; also, note (*d*) to page 242; Bacon's Ab. vol. 10, page 533.

3. Had the testator willed the estate to defendant's wife *and her heirs, never to be mortgaged or sold forever*, the latter words would then have amounted to a perpetuity, but it is manifest from the words used that the testator only intended the defendant's wife should have a life estate, and she was not to have the power to mortgage or sell. The words "by her" can easily be ~~omitted~~ inserted, and when the intention of the testator is incorrectly expressed, the Court will carry it into effect by supplying the proper words, if necessary, and no part of the will can be excluded unless to escape total incompetency. 2 Paige, 130, 131, 248.

R. S. NELSON,

For Plaintiff in Error.

[85411-J

Guardian Office print, Mt. Vernon.

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Perry Greeting:

Because, *In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of* Perry *county, before the Judge thereof between*

Robert Dickson Junr. plaintiff and Rachel Ann Halliday, William Halliday, Elizabeth Halliday, Matthew Halliday Junr. and Samuel Halliday their Guardian defendants it is said manifest error hath intervened to the injury of the aforesaid Rachel Ann Halliday & others as we are informed by their complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at **Mount Vernon**, in the County of Jefferson, on the first Tuesday after the 2d Monday of November next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. John D. Caton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this twenty-seventh day of September in the year of our Lord one thousand eight hundred and Sixty-One.

Noah Johnston
Clerk of the Supreme Court.

[F541-2]

22

SUPREME COURT.

First Grand Division.

Rachel Ann Holliday
& others

Plaintiffs in Error,

VS.

Robert Dickson Jun

Defendant in Error.

WRIT OF ERROR.

Issued & FILED Sept. 27 1861.

N Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Perry County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Perry county, before the Judge thereof between

Robert Dickson Junr plaintiff and Rachel Ann Halliday, William Halliday, Elizabeth Halliday, Mathias Halliday and Samuel Halliday Their Guardian defendants it is said that manifest error hath intervened to the injury of said Rachel Ann Halliday & others as we are informed by their complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof; to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Robert Dickson Junr

that he be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Robert Dickson Junr. notice together with this writ.

WITNESS, the Hon. John D. Caton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this twenty-seventh day of September in the year of our Lord one thousand eight hundred and Sixty-One.

Noah H Purston
Clerk of the Supreme Court.

L8541-3

22

SUPREME COURT.

First Grand Division.

Rachel Ann Holliday
& others

Plaintiffs in Error,

VS.

Robert Dickson Junr.

Defendant in Error.

Shff's fees service	50
Mileage 15 miles	75
Retn & postage	15
	$1.40

A A Clymer Sheriff Pd

SCIRE FACIAS.

FILED.

Executed the within writ by reading to the within named Robert Dickson Junr. this 12th Dec 1861

A A Clymer Sheriff Perry Co. Ills

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

RACHEL ANN HOLLIDAY et al, Plff. in Error
vs.
ROBERT DIXON, Jr., Defendant in Error.
} Error to Perry.

BRIEF OF DEFENDANT IN ERROR.

The only question deemed important in this case arises upon the construction of the words in the will of Mathew Holliday, quoted in plaintiff's abstract to wit: "I will and bequeath to my oldest daughter, Margaret Jane Elizabeth Holliday, the eighty acres of land where my house and well stands, *never to her and her heirs forever, never to be mortgaged and sold forever.*

What estate passed by those words? It will not do to say that the language is wholly inoperative, for it is a well settled rule of interpretation that a liberal construction shall be put upon all legal instruments, so as to uphold them, if possible, and carry into effect the intention of the parties, so that every part may be made to operate. And especially in the case of wills the *intention* of the testator is the polar star by which the Court should be guided; and if there exist any obscurity in the language of a will, owing to its peculiar phraseology, and the Court can by any means ascertain the real intention of the testator and give effect to the several parts of the will without rendering any component part inoperative it is bound to do so. Jones vs. Bramblet 1 Scam. 276. Co. Litt. 36. Brown Leg. Max. 414, 425. Watson vs. Foxon 2 East. Welles R. 296. 1 Jarman on Wills 318. Dew vs. McMurtrie. 3 Green 276. Lillard vs. Reynolds, 3, Iredell 366.

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The estate conveyed cannot be a mere estate for life. Because, 1st, the language used contains plain legal words of inheritance; and 2d, if that portion of the will italicised above were stricken out, a fee simple estate would still pass. At common law it would not be so. But now by our statute it is provided that "every estate in lands which shall be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised, by construction or operation of law." Rev Stat. 1845 p. 105 S. 13. Scates Stat. 961. This of itself determines the case, unless it can be shown that a less than a fee simple estate of inheritance *is limited by express words.*

Independent of this legislative construction it is impossible to explain the language of the will, and make it consistent with a purpose in the testator to convey only an estate for life. With such a purpose other and entirely different language must have been used by any one, even the most illiterate. Upon a consideration of the will it seems impossible to resist the conclusion that the word "never," where it first appears in said clause, is an accidental interpolation, never intended to be used by the testator, and that the will should be read as if said word was not in it. In that way it is freed from all doubt or ambiguity.

The right of the Court to discard said word and read the will as if it was not in it, is unquestionable, and supported by the entire current of authorities.

If there are words which have no intelligible meaning, or be absurd, or repugnant to the clear intent of the rest of the will, they may be rejected. 1 Jarman on Wills 331, 333–393, note—Bartlett vs. King 12 Mass. 542. 3 Ves. Jun. 320. 2 Ves. 564.

Words which it is obvious are miswritten, (as dying *with* issue for dying *without* issue,) may be corrected. 2 Jarman on Wills 522, Rule 20. 8 Mod. 59. 5 Barn. & Adolph. 621. 3 Adolph. & Ellis 340.

Courts indeed have gone much farther, and have established by numerous cases that words in a will may even be supplied, transposed or changed, and new words substituted in order to effectuate the intention of the testator, as collected from the context. 1 Jarman on Wills 405 et sequitur, and the numerous cases there cited.

MARSHALL & WALL,

For Defendant in Error.

Guardian Office print, Mt. Vernon.

22 - 21

Holladay
&
Dickson
/

Julia Nov. 14 - 1866 -

St. Johnstown Pa

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

FIRST GRAND DIVISION,

At Mount Vernon ---- November Term, A. D., 1861.

RACHEL ANN HOLLIDAY, WILLIAM HOLLIDAY, ELIZABETH HOLLIDAY, MATTHEW HOLLIDAY, JR., and SAMUEL HOLLIDAY their Lawful Guardian, *Plaintiffs in Error*,

vs.

ROBERT DIXON, JR., *Defendant in Error.*

Error to Perry.

ABSTRACT OF PLAINTIFF'S CASE.

Page

Robert Dixon, jun., the plaintiff in the court below and defendant in error, at the April term of the Perry Circuit Court, 1860, filed his petition in the Circuit Court of Perry county, setting forth that he was the husband of Margaret Jane Elizabeth Holliday, eldest daughter of Matthew Holliday, deceased, and that on the 2d December, 1848, said Holliday, being seized in fee of the following described real estate, viz: East ½ north-west quarter, section 21, town 4 south, range 4 west, 3d principal meridian, in said county of Perry, Illinois, made his will, in substance as follows: "I will and bequeath to my oldest daughter, Margaret Jane Elizabeth Holliday, the eighty acres of land where my house and well stands, to her and her heirs forever, never to be mortgaged and sold forever," (as by this will which was made an exhibit of and referred to as schedule A in said petition will amongst other things more fully and at large appear,)—that on the 1st April, 1859, petitioner intermarried with the said Margaret Jane Elizabeth Holliday, deceased, and lived with her as her lawful husband until she died, which was on the 11th July, 1860; that there was no issue of the marriage born alive; and the defendants in the court below were brothers and sisters of his said wife, and her only surviving heirs-at-law, and as such interested in said estate, and that the defendants in the court below are minor children of this Matthew Holliday, dec'd, by a second wife, excepting the def't Samuel, who is their lawful guardian.

The petitioner claims by his petition that he is entitled by law to one undivided half of the above described 80 acre tract of land, (it being the same 80 acre tract in the will referred to,) as heir by statute of his said wife, the fee-simple therein being by the terms of said Matthew's will devised to said Margaret Jane Elizabeth, the wife of petitioner, as above stated, and prayed a partition thereof accordingly.

There was no service upon the defendants in the court below, but their appearance was entered and a guardian *ad litem* also appointed to defend for them, who filed an answer for the minor defendants. The said Samuel Holliday, guardian, filed a demurrer to the petition and did not answer after a rule to answer was given against him, and as to him the petition was taken for confessed, and at the September term, 1860, of the Perry Circuit Court, a final decree for the partition of the premises was entered according to the prayer of the petitioner, and partition made by commissioners who at the April term A. D. 1861, of said court made their final report which was filed and approved by the court, but excepted to at same term by plaintiff in error.

The defendants in the court below bring the cause by writ of error into this court, and seek to reverse the decree of the court below for the following reasons —First, because there was no proper or legal service upon the minor heirs by summons; and secondly, because the said wife of the said Robert Dixon, jun., did not by the will of the said Matthew take an estate in fee-simple in the lands described in will, but only an estate for life, and that upon her death the said estate descended to the plaintiffs in error, as heirs at law. of Matthew Holliday Sen

R. S. NELSON, *for Pl'ffs in Error.*

Points and References relied on by Plaintiffs in Error:

[8541-4]

22 - 21

Holliday & al
vs
Dickerson

Abstract

Filed Nov. 11- 1861.
A. Johnston Clk

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

RACHEL ANN HOLLIDAY et al, Plff. in Error
vs.
ROBERT DIXON, Jr., Defendant in Error.
} Error to Perry.

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MARSHALL & WALL,

For Defendant in Error.

(8541-2)

Guardian Office print, Mt. Vernon.

22 - 21

Halliday

v

~~Hoffman~~

Dayton

Deft's brief

8541

Filed Nov. 14-1861-

Jr. Johnston Clk

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

RACHEL ANN HOLLIDAY, WILLIAM HOLLIDAY, ELIZABETH HOLLIDAY, MATTHEW HOLLIDAY, JR., and SAMUEL HOLLIDAY their Lawful Guardian, *Plaintiffs in Error*,

vs.

ROBERT DIXON, JR., *Defendant in Error.*

} Error to Perry.

ABSTRACT OF PLAINTIFF'S CASE.

Page 5

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6 never

see page 11 of record in will

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R. S. NELSON, *for Pl'ffs in Error.*

Points and References relied on by Plaintiffs in Error:

L9541-97

22

Holliday et al

vs

Dickinson

Abstract

Offer

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160
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$11.20

Filed Nov. 11-1861.

N. Johnston Clk