State of MO to use of Watts, H G et al vs. Boon, William C et al; 1869 Howard Co. 283/1

104/7

· Recovery - land of heirs sold by exr. B alone + he did not give over all proceeds from sale

· State sued B + W, E (wife of dec.) for bond even though she had no part in sale because re-marriage caused her role as extrix to end

· Affirmed - her sureties are not liable for acts committed solely by Boon

Page 1

Pleas before the Hon R. C. L. DeBolt Hon G. G. Burkhartt and Hon E. D. Wilson judges of the 4th District Court in the State of Missouri.

Be it remembered that heretofore to wit:- on the 29th day of June AD 1868, there was filed in the office of the Clerk of the 4th District Court in the State of Missouri. a certified transcript of the records & proceedings in an appealed case from the Circuit Court of Howard County in the State of Missouri wherein the State of Missouri to the use of Hampton B. Watts, Carrie Watts, Louisa Watts and Rowena Watts, by their Guardian Horace Kingsbery is appellant and William C Boon, John L Morrison Charles L Givins and John Davis are Respondents

The said transcript was certified to according to law by Charles H Stewart Clerk of the said Circuit Court of Howard County and is in words and figures as follows to wit:-

Over

3 State of Missouri }
County of Howard } In the Circuit Court
of Howard County

Among other proceedings had in said Court the following petition was filed in the office of the Clerk of said County on the 7th day of May 1868 which petition is in the following words and figures to wit:-

State of Missouri, County
of Howard, In the Circuit Court
June Term 1868

Petition

State of Missouri to the use of Hampton B Watts ~~by their~~ Carrie Watts, Louisa Watts and Rowena Watts, by their guardian Horace Kingsbury. — Plaintiff

Against

William C Boon, John L Morrison Charles E Stevens and ~~Jeff~~ Davis Defendents

Plaintiffs states that Hampton B Watts Carrie Watts, Louisa Watts and Rowena Watts are the minor heirs of Benjamin Watts decd of whom the plaintiff is guardian — that the defendents William C Boon and Evalina Watts, now Consin, on

the 24th day of September, eight ~~hun~~ hundred and fifty seven were appointed administrator of the estate of said Benjamin Watts deceased and qualified and executed a bond as such administrator - a copy of which bond is herewith attached and made a part of this petition the original being on file in the office of the Clerk of the County Court of Howard County, and not under the control of Plaintiff) That the said Evaline Cousin, since she was appointed and qualified as ~~such~~ joint administrator with said defendant William C Boon of the estate of Benjamin Watts deceased, intermarried with George R Carson with whom she is now living as his husband, that in the 9th day of February 1868 the Legislature of the state of Missouri, by and act entitled An Act for the benefit of the heirs of Benjamin Watts deceased, approved on the 9th day of February 1857, authorizing and empowered the said Evaline Watts, now Evaline Carson and defendant William C Boon administrators of the Estate of Benjamin Watts deceased, to sell and convey all

5
Petition

the real Estate belonging to the said Benjamine Watts deceased at the time of his death, lying in said County of Howard, in the manner and upon the terms prescribed by said act of the legislature - that said act of the legislature among other things provided that the County Court of Howard County should require said administrator before selling any of said real Estate to give a bond and security to be approved of by the said Court sufficient to secure to the heirs of the said Benjamine Watts deceased the full amount for which said real Estate might be sold together with interest thereon until distribution - that in pursuance of the requirements of said Court, the said Evalina Watts now Cousin as administrator is and the defendent William C Boone as administrator as principals with John A Talbot and defendent John L Morrison, Charles L Givins and John Davis as securities made their bond to the State of Missouri in the penal sum of two hundred thousand dollars for the payment of which well and truly to be made, they thereby bound themselves, their heirs, executors and administrators jointly and severally, conditions as follows "The above named

Evalina Watts and William C Boon as administratrix and administrator of the estate of Benjamin Watts deceased, by an Act of the General Assembly of the State of Missouri, entitled "An Act for the benefit of the heirs of Benjamin Watts, deceased, approved February 9th 1857, have been authorized and empowered to sell and convey all the real estate belonging to the said Benjamin Watts deceased, lying in Howard County. Now if the said Evalina Watts administratrix and William C Boon administrator as aforesaid, shall in all things faithfully comply with said Act of the General Assembly and discharge all the duties enjoined upon them by law or the order or decree of any Court having jurisdiction, touching the sale of said real estate or any part thereof and faithfully manage, pay and distribute the proceeds of the said real estate, this bond to be void, otherwise to remain in full force & virtue. That the said bond was approved by the County Court of Howard County in the 15th day of December 1867, a copy of which bond is herewith attached and made a part of this petition. The original being on

7 file in the office of the Clerk of the ~~County~~ Court of Howard County and is not under the control of the plaintiff, that the said Benjamin Watts died leaving five heirs and distributees of his estate all of whom are living and under the age of twenty one years except Bennetta Watts who is over the age of twenty one years, that the defendents William C Boon and the said ~~Edward Watts~~ Evalina Watts before her marriage with the said George H Carson, as administrators of the estate of Benjamin Watts, sold and conveyed large amount of the real estate of the said Benjamin Watts deceased, lying in Howard County aforesaid and that on the 17th day of April 1848, the defendents William C Boon and Evaline Carson made a full settlement in the Circuit Court of Howard County of the amount of money received by the sale of said real estate, before the marriage of the said Evalina Watts, with the said George H Carson, by which settlement it appeared that there is in their hands and due the said heirs of said Watts on account of money received by them for land sold and conveyed before the marriage of said Evalina Watts to said Carson, the sum

of nine thousand four hundred and twenty dollars and four cents and the said Circuit Court made an order of distribution of said sum equally among the heirs of the said Benjamin Watts deceased, requiring the said Evalina Watts now Carson and the said defendant William C Boon administrators of the said Benjamin Watts deceased, to pay and distribute in equal parts to said heirs the said sum of nine thousand four hundred and ninety nine dollars and four cents — That the plaintiff as guardian of the said Hampton B Watts, Carrie Watts, Louis Watts and Bowen Watts, minor heirs of the said Benjamin Watts deceased are entitled to have and receive of and from the said Evalina Watts now Carson and the said defendant William C Boon as administrator as aforesaid ~~four fifths~~ four fifths of said amount, being the sum of seven thousand five hundred and ninety nine dollars and twenty four cents and the defendant assigns as breaches of the last mentioned bond that neither the said Evalina Watts now Carson nor the said William C Boon as

Petition

9 administrators as aforesaid have paid the said sum of seven thousand five hundred and ninety nine dollars and twenty four cents or any part thereof to the plaintiff or any other person authorized to receive the same, as the said defendant William C Boon and the said Evalina Watts now Carson are bound by said order of distribution to do, although often requested ~~to~~ to do so whereby the plaintiff is damaged to the amount of seven thousand five hundred and ninety nine dollars and twenty four cents and interest thereon from the 17th day of April 1868.

Petition

Plaintiff further states that Defendant William C Boon administrator of the said Watts deceased on the 17th day of April 1868, made a final settlement in the said Circuit Court of Howard County of the amount of money received by him as administrator as aforesaid for and on account of the sale of said land since the marriage of Evalina Watts with the said George W Carson by which settlement it appears that there is in his hands and due the heirs ~~aforesaid~~ of said Watts deceased in account of money received by him for land sold and con-

verged belonging to said estate since the marriage of said Evalina Watts with George McCason, the sum of forty seven thousand seven hundred and twenty three dollars and forty eight cents, and the said Circuit Court made an order of distribution of said sum ~~of~~ equally among the heirs of the said Watts deceased, requiring the said defendant William C Boon, as administrator as aforesaid to pay and distribute to the heirs of the said Watts deceased in equal parts the sum of forty seven ~~seven~~ thousand seven hundred and and twenty three dollars and forty eight cents - The Plaintiff avers that he is entitled as guardian aforesaid to have and receive from the said William C Boon administrator as aforesaid four fifths of the said sum of of forty seven thousand, seven hundred and twenty three dollars and forty eight cents being the sum of thirty eight thousand, one hundred and seventy eight dollars and seventy six cents. The Plaintiff assigns as a further breach of said Cost Men-

11

tioned bond that the said William C Boon as administrator as aforesaid has not payed to him or to any other person authorized to receive the same the said sum of thirty eight thousand one hundred and twenty eight dollars and seventy six cents or any part thereof as the said defendent William C Boon was and is bound & do by said order of distribution although often requested so to do, whereby the plaintiff is damaged to the amount of thirty eight thousand, one hundred and seventy eight dollars and seventy six cents with interest thereon from the 17th day of April 1868. The Plaintiff therefore pray judgement against defendents for the sum of two hundred thousand dollars, the penalty of said bond and an award of execution for the amount of the damages as sustained and as above set forth in the petition, amounting in the aggregate to the sum of forty five thousand, seven hundred and seventy eight dollars with interest thereon from date of the several orders of distribution as above set forth in this petition

J B Clark & Son
Attys for Plaintiff

12

Bond

Know all men by these presents that we Evalina Watts and William C Boon as principal and John A Talbot, Jon L Morrison, Charles E Givens and Joseph Davis as securities are held and firmly bound unto the State of Missouri in the penal sum of two hundred thousand Dollars for the payment of which well and truly to be made, we bind ourselve, our heirs, executors and administrators jointly and severally firmly by these presents, Signed and sealed on this 15th day of December AD 1867. The condition of this bond is as follows: The above named Evalina Watts and William C Boon administratorix and administrator of the estate of Benjamin Watts deceased by an act of the General Assembly of this ~~State of Missouri~~ entitled An act for the benefit of the heirs of Benjamin Watts deceased, approved February 9th 1847 have been authorized and empowered to sell and convey all the real estate of said Benjamin Watts lying in Howard County. Now if said Evalina Watts administratorix and William C Boon administrator as aforesaid shall in all things

13 faithfully comply with the said Act of the Generally Assembly and discharge all the duties enjoined upon them by law or the order or decree of any Court having jurisdiction touching the sale of said real estate or any part thereof and faithfully manage, pay and distribute the proceeds of the sale of said real estate this bond to be void; Otherwise to remain in full force and virtue

Witness Evalina Watts (Seal)
William C Boon (Seal)
John A Talbot (Seal)
John L Morrison (Seal)
Charles E Givens (Seal)
Jo Davis (Seal)

Approved December 15th 1857
J Swetnam Pres.

Filed December 15th 1857
A J Herndon. Clerk

Missouri Howard County Sect
I Andrew J Herndon Clerk of the County Court of the County aforesaid do Certify that the within bond of Evalina Watts and William C Boon Admrs of the estate of Benjamin Watts decd (this bond being for the sale of real estate) were filed December 15th 1857, and is duly recorded in will & bond Book No 4 in page 31

Given under my hand and the Seal aforesaid of said Court at office January 12th 1858

S S

A J Herndon, Clerk.
Per W O Burton D C

Missouri — Howard County Set
I Andrew J Herndon clerk of the County Court in and for the aforesaid County do certify that the foregoing is a true copy of the bond of Evalina Watts administratrix and William C Boon Administrator of Benjamin Watts deceased, given in relation to the sale of real estate together with endorsements thereon as fully and truly as the same remains aforesaid in my office —

S S

Given under my hand and seal of said Court at office — April 28th 1868

A J Herndon, Clerk
By Thomas Owing D C

Know all men by these presents that we Evalina Watts and William

15 C Boon as principals and John R White, John P ~~Talbot~~ Sebree, John H ~~Estill~~ and George H Carson as securities are held and firmly bound unto the State of Missouri in the penal sum of One hundred thousand dollars for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents—

Signed and sealed in this 26th day of September 1856. The Conditions of the above bond is that if Evalina Watts Administratorix and William C Boon administrator of the Estate of Benjaman Watts deceased, shall faithfully administer said estate, account for, pay and deliver all money and property of said estate and perform all other things touching said administration required by law or the order or decree of any Court having jurisdiction then the above bond to be void: Otherwise to remain in full force

Witness } Evalina Watts (Seal)
A J Herndon } William C Boon (Seal)
John R White (Seal)

John R Sebree (Seal)
John H Estill (Seal)
George H Carson (Seal)

Approved & ordered to be recorded February 3 1858
J Swetnam, Pres

Filed Sept 26 1856
A J Herndon Clerk

Missouri, Howard County, Set

I, Andrew J Herndon, Clerk of the County Court of Howard County aforesaid, do certify that the within bond of Evalina Watts administratrix and William C Boon Administrator of the Estate of Benjamin Watts deceased was filed in my Office September 26th 1856, and is duly recorded in Will and Bond Book on Page 512

T. T.

Given under my hand and the Seal of said Court at Office October 21st 1856
A J Herndon Clerk
By W O Burton D. C

Missouri - Howard County - Set

I, Andrew J Herndon Clerk of the County Court in & for the aforesaid County do certify that the within is a true

17. Copy of the bond of Evalina Watts, Administratorix and William C Boon Administrator of the Estate of Benjamin Watts deceased, recorded in Will & Bond Book Page 512

Witness my hand and seal of office, April 29th 1868

A J Herndon clerk
By Thos Owing D.C.

On which said foregoing petition the following writ was issued to wit:—

"State of Missouri } Set
County of Howard }

Writ to Howard Co.

The State of Missouri to the Sheriff of Howard County Greeting—

We Command You to Summons William C Boon, John S Morrison, Chas E Givens and Joseph Davis to be and Appear before the judge of Howard Circuit Court at Fayette, in Howard County on the first Monday in June and answer the foregoing petition of the State of Missouri to use of Hampton B Watts et al by H Kingsbury Guardian &c Plaintiff and have You then and there this writ.

Witness Charles Stewart, Clerk of said Court under the seal thereof at office on the 8th day of May 1868

C H Stewart clerk

18

Return of Sheriff of Howard Co

I certify that I served the within petition petition and writ by delivering a certified copy of the writ to a white member of the family over the age of fifteen years at the usual place of abode of the within named Charles E Given on the 12th and by delivering a certified copy of the writ and petition to John L Morrison and a certified copy of the writ to Joseph Davis on the 13th day of May 1868 in Howard County

Rice Patterson S. H & C
By C E Burkhartt D. S.

State of Missouri }
County of Howard } Sct

Write issued to Shff of Coal Co

The State of Missouri to the Sheriff of Coal County Greeting:—

We command you to Summons William C Boon to be and appear before the Judge of the Howard Circuit Court at Fayette in Howard County on the first Monday of June next and answer the foregoing petition of the State of Missouri to use of Hampton B Watts et al by Kingsbury guardian &c Plaintiff and have you then & there this writ.

Witness Chas H Stewart

19

Clerk of said Court under Seal thereof at office in Fayette on the 8th day of May 1868

C H Stewart Clerk

Return on Writ of the Sheriff of Coal Co.

I, G H Dulle, Sheriff within and for the County of Coal and State of Missouri do hereby certify that I have Executed the within writ and annexed petition by delivering to Wm C Boon the within named defendant a true, Complete & Certified Copy of the within writ and annexed petition, Done in the County of Coal this the 12th day of May A D 1868

G H Dulle Sheriff, Coal Co. Mo
By Joseph Stamphle D.S.

And afterwards To Wit: on the 4th day of June 1868, the following order was made in said Court To Wit:—

State of Missouri, to use of Hampton Watts et al
vs
William C Boon et al } Now at this day come the Defendants in this Cause by their Attys and file their answer, which answer is in the following words and figures To Wit:—

Answer by Deft

20

The State of Missouri to the use of Hampton B Watts Caviil Watts, Louis Watts and Romany Watts by their Guardian, Horace Kingsbury, Plaintiff

against

William C Boon, John Le Morrison, Charles E Givens and Joseph Davis—Defendants

The defendants, John Le Morrison, Charles E Givens and Joseph Davis for their joint and seperate answer to said petition, state that the Act of the Legislation of the 9th of February 1857, refered to by plaintiffs confered upon Wm C Boon and Evalina Watts in their individually capacity and not as administrators a joint statutory power to sell and convey the lands of said Benjamin Watts deceased, situated in Howard County. By refference to said Act of the Legislating it will be seen that said statutory powers could not be executed by one of said donors of the powers alone, and the said bond given by them under said Act of the Legislation was not a bond given by them as administrators, but was given under said Act as by refference to the said bond a copy of which is

21

annexed to the petition, the same will more fully appear and these defendants charge that they were and are only securities and not principals in said bond and that by virtue of said bond, they were only liable for the joint act of the said Evalina Watts and the said Wm. C Boon, and not for the seperate act or act alone of said Boon and they state they were only liable for the sale of said lands made jointly under said act of the Legislature by the said Evalina Watts and the said Boon. They further deny that the said Boon had any power or authority under said act of the Legislature or under said bond sued on in this case to make seperate sales of said lands without joining the said Evalina Watts in said sale, and they deny that said Boon did under said bond sued on make any such sale.

But they charge that the sale referred to by Plaintiff is as being made by said Boon alone, were made under and by virtue of an ~~act~~ amended act of the legislature of the state of Missouri, approved January 28th 1859, and that these defendants are not liable for his said acts in making

22 Answer

sales & under said Amended Act of the legislature, that said last mentioned sales were not made under said bond and could not be made under said bond sued on, and said seperate act of sale so made by said Boon alone and his failure to account for the same or his failure to comply with the rules of said Courts or Circuit Court in refusing assent to said seperate sales, or his failure to pay over the amount of said seperate sales so found against him on settlement are no breaches of said bond sued on as charged by said Plaintiffs - and the defendants deny that the said settlements referred to by the plaintiffs were made by said Boon and Watts as administrators of said Benjamin Watts deceased: but they charge that the said settlements first referred to by Plaintiffs was made by the said Boon & Evalina Watts, not as administrators, but was made by them under and by virtue of the said first named Act of the Legislature - and the said last mentioned settlement referred to as made by said Boon alone, was not made by him as

23

Administrator, but was made under and by virtue of said Amended Act, and these defendents are not liable for the same or any part thereof as hereinbefore charged

Prewett, Adams & Hall
for Defts

And afterward on the 5th day of June 1868, following order was made to wit: —

Order filing Demurrer

"The State of Missouri to use of Hampton B Watts et al by H Kingsbury Guardian, Plaintiffs
vs
Wm C Boon et al Defendants } Now at this day comes the Plaintiffs by his Atty and files his Demurrer to Defendents Answer in this case

Which Demurrer is in the following words to wit:

The State of Missouri to use of Hampton B Watts Carrie Watts, Louisa Watts and Romena Watts by their Guardian Horace Kingsbury - Plfts
Against
William C Boon John S Morrison, Charles E Givens and Joseph Davis - Defendents

In the Circuit, Howard Co
June Term 1868

Plaintiffs demurrer to the answer of the Defendents in the above entitled cause

for the ground that it appears upon the face of the answer

1st That the answer does not state facts sufficient to constitute a defense to Plaintiffs cause of action

J B Clark & Son
Attys for Plaintiff

And afterwards to wit: on the 6th day of June, the following was rendered to wit:

The State of Missouri to use of Hampton B Watts, Carrie Watts, Louis Watts Rowena Watts by their guardian Horace Kingsbury - Plaintiff

vs

Milian C Boon, John L Morrison Charles E Jevins & Joseph Davis Defendants

Now at this day, this cause comming on to be heard on the demurrer filed by the plaintiffs to the answer of the defendants Charles E Jevins Joseph Davis and John L Morrison, and the Court after hearing the said demurrer overruled the same,

And said cause being submitted to the Court, and the breach first above laid in the Plaintiffs petition remaining undefended the Court assessed ~~damages for~~

~~the said~~ plaintiffs damages for the said breach first above laid in Plaintiffs petition at the sum of seven thousand six hundred and fifty two dollars and twenty one cents, It is therefore considered by the Court that the plaintiff have judgement against the ~~defend~~ defendents for the sum of two hundred thousand dollars, the amount of penalty of said bond and an award of execution to the use of Hampton B Watts, Carrie Watts Louisa Watts and Romena Watts for the sum of seven thousand six hundred & fifty two dollars and twenty one cents, the damages so assessed on the breach in the plaintiffs petition first above laid and that they have execution therefor, together with their cost on their behalf laid out and expended. And in further consideration by the Court that the defendants have judgements upon the said demurrer against the said Plaintiff, and that the plaintiff take nothing against the defendants by virtue of the breach of the said

bond in plaintiffs petition secondly
laid. and that the defendants as to
the breach of the said bond in plain-
tiff's petition secondly above laid go
hence without day and that they
have execution for their costs in
that behalf laid out and ~~expended~~
expended. And thereupon comes
the Plaintiff and prays an appeal
to the District Court and by agreement
of parties the appeal is granted
without affidavit or bond and
said appeal is to operate as a
supersedias

State of Missouri } ss
County of Howard } I, Charles Sla
Stewart, Clerk of the Circuit Court
in & for said County, do hereby
certify that the foregoing is a true
and complete transcript of the
records and proceedings had in the
Howard Circuit Court, in the cause
wherein the state of Missouri to the
use of Hampton B Watts et al are
plaintiffs and William C Boon et al
are defendants as fully and fully
as the same now remains of record

27 and on file in my office

S S

Given under my hand and the seal of said Court at office at Fayette on this 26th day of June AD 1868

C H Stewart Clerk

Cost in Howard Circuit Court

C. H. Stewart Clerk	$36,00
R Patterson, Sheriff of Howard Co	3,00
G I Dulle " " Coal "	1,00
	$40,00

And be it further remembered that at the July Term of the said Fourth District Court of Missouri, being present Hon. R. A. DeBolt, Hon. G. H. Burkhart and Hon. C. C. Wilson Judges, and W. C. Barr Clerk and Wm. Forbes Marshal, on the 21st of July 1868, the said parties to wit: Watts et al vs Boon et al by their respective Attorneys filed their Assignment of Errors which are in words and figures as follows to wit:-

In the 4th District Court
July Term 1868

State of Missouri to the use of
Hampton B Watts and others
vs } Appealed from Howard Cir. Ct.
William C Boon & others

Assignment of Error

The Appellants by their attorney alleges, that in the record and proceedings of the Circuit Court in this case there is manifest error in this to wit:—

First the Circuit Court overruled the demurrer of the plaintiff below to the answer of the

29

defendents to the plantiffs petition when said Court ought to have sustained said demurrer

Second – the said Circuit Court gave judgement for the defendents on said Demurrer when by the law of the land it should have given judgement for the plaintiffs – Therefore these and other errors appearing in this record and proceedings of said Circuit Court the said appellants pray this Court to set aside the said judgement of the Circuit Court and hold the same for nought and to render such judgement and take such action in the case as the law requires and to this Court may seem meet and proper

J B Clark & Son
Attys Appellant

Joinder in error

And the defendents below, the appellees come and join in error & say there is no error in the records & proceedings in this case

Prewitt & Heall Attys
for Defendents

and afterward on the same day to wit 21st of July 1868 - the following proceedings were had & made a part of the record of the said Fourth District Court - which record is in words & figures as follows to wit:

State of Missouri to the use of Watts heirs et al - Appellants

vs

Wm. Boon et al - Respondents

Judgement on record

Now at this day come the above parties by their respective Attorneys, having filed their assignment of errors & joinder in error Statements of case and their briefs and after arguing the same, submitted the cause and the Court being sufficiently advised of and concerning the premises, do consider and adjudge that the judgement rendered herein be affirmed & opinion filed filed.

The said Opinion was delivered by Judge R. A. DeBolt, Judge

31

Burkhardt concurring and Judge Wilson dissenting and is in words and figures as follows to wit:—

Copy of Opinion of Court

"State to the use of &c. Appellants
against
William C Boon et al. Respondents

Appealed from Howard Circuit Court

"De Bolt, Judge delivered the Opinion of the Court.

"This suit was brought in the name of the State, to the use of the minor heirs of Benjamin Watts deceased, by their guardian Horace Kingsbury, against William C Boon, Charles L Irvins, John L Morrison and Joseph Davis. The petition alleges the death of Benjamin Watts, and that Evalina Watts and Wm C Boon were the administrators of his estate, and by an act of the legislature, approved Feb 9th 1867, they were authorized and empowered to sell the real estate belonging to the deceased for the benefit of the heirs; - that they gave a joint bond in pursuance thereof in the sum of $200,000. conditioned for the faithful

performance of their duties. – that they proceeded to sell real estate to the amount of $9499,04 which was approved, and the Court ordered distribution of the proceeds among the heirs; with which order the said Boon and Watts failed to comply.

This is assigned as the first breach of the bond. The petition further states that the said Evaline Watts intermarried with George H Carson and is now his wife. – That after the marriage of the said Evaline Watts, the said Wm C Boon sold land belonging to said estate to the amount of $4723,48 which was approved and distribution ordered, with which order the said Boon failed to comply. This is assigned as a further breach of the bond. Plaintiff asks judgement for the full amount of the bond, and an award of execution for the ~~same~~ sum of $45,778 with interest it being the amount due him as guardian of the minor heirs.

Defendants J Sm Le Morrison, Charles E Givens and Joseph Davis, answer that the act of February 9th 1857 conferred upon Wm C Boon and Evaline Watts in their individual capacity and not as administrators, a joint statutary power to sell the real estate

32

of Benjamin Watts deceased, — that the bond was not given by them as administrators, but was given under said Act of the legislature; — that the defendants are only securities and not principals in said bond: — that they were only liable for the joint acts of the said Boon & Watts and not for the separate act of Boon alone. They deny that said Boon had any power or authority to make seperate sales without ~~jointly with~~ joining with him the said Evaline Watts; they deny that Boon made any separate sales under said bond

Copy of Opinion

The defendants charge that the seperate sales made by Boon, were made under and by virtue of an Act of the Legislature approved January 28th 1859 amendatory of act approved Feb 9th 1857 and being thus made they are not liable

To this answer the plaintiff filed a demurrer, assigning as a reason, that it failed to state fact sufficient to constitute a defence, which was overruled,

Thereupon the cause was submitted to the Court, and the breach first laid in plaintiffs petition remaining undefended the Court assessed the damages on said first breach at the sum of

$7625.21. and rendered judgement for the full amount of the bond, and awarded execution in favor of plaintiff Horace Kingsbury to the use of the heirs for the amount of damages assessed.

Plaintiff prayed an appeal to this Court and by agreement the appeal was granted without affidavit or bond and was to operate as a supersedeas.

It stands admitted by the pleadings that William C Boon and Evaline Watts were the administrators of the estate of Benjamin Watts deceased. But it is denied that they as such administrators were authorized to sell and dispose of the real estate of the said Benjamin Watts deceased.

It is well settled that administrators have no authority, under the general law of this state to sell and dispose of the real estate of the deceased, except the payment of debts.

The power to sell in this case was derived from the act of the legislature approved Feb 9th 1857. It is claimed that this act confers upon said Boon and Watts the power to sell as administrator, or in other

34

Copy of Opinion

words it only enlarged or extended their powers as such; and Evaline Watts having married, her letters were by the general law revoked, and all the power conferred upon both by the said act at once vested in and could be exercised by Wm C Boon the survivor.

The first section of the act referred to reads as follows: "Evaline Watts administratrix and Wm C Boon administrator of the estate of Benjamin Watts deceased, of the County of Howard, are hereby authorized and empowered to sell and convey all the real estate belonging to said Benjamin Watts, at the time of his death, lying in said County of Howard."

The other sections of the act prescribes the manner of appraisement - and if sold ~~and~~ on a credit how the money should be secured; - that it should not be sold for less than the appraised value; - that it might first be laid out into lots; - that the administrators should ~~not~~ make report of their proceedings to the County Court, and if approved (the purchase money being paid) they should make the purchaser a deed; - that after paying all rea-

35 sonable expences, they should loan the money untill the Court should order distribution among the heirs; — and it also required them before entering upon their duties to give bond and security to be approved by the Court. (See Laws of Missouri 1856, - 7 - Page 190)

It is clear that all the authorities they possessed in the premises was given by this special Act: — And it no where provides for the revocation of their letters of administration, or the performance of the duties by one in case of the death or disability of the other. No refferance whatever is made to the General law of the State; therefore its provisions can not with any sence of Justice be called in to supply that upon which the special law creating the power is silent. The Act did not require Boon & Watts to sell in their official capacity as administrators, nor to account as such for the proceeds of the sales made by them.

The words administratorix and administrators as used in the act are only descripto personae (Lecompte vs Seargeant 7 Mo R 351, Jeffries vs McLane 12 Mo R 538)

If the Act had conferred upon the administrators of the Estate of

86 Benjamin Watts deceased the power to sell; even though it afterwards had named them; the trust would perhaps have been committed to them in their official capacity (2 Story's Equity 1042)

But the act names the two persons to whom is granted the power to sell, not in a fiduciary capacity, but as individuals, and thus it becomes a special authority expressly confided to them by the statute and must be strictly pursued.

"Naked and ~~sicton~~ discretionary power given to two or more persons by name, must be exercised by all the persons named, and can not be performed by a less number unless by express provision to that effect; nor do such powers survive in case of the death of one of the parties" (Powell et al vs Tuttle et al 3 Comst N Y R 396. Olmstead vs Elder 5 N Y R 144. 1 Story Equity Sect 96, Sherwood vs Reade 7 Hill R 431, 3 Cowen R 654. 7 Cowen R 187, Hill on Trustees 488 (side page) Fowler vs City of St Joseph 37 Mo 237. 1 Leading Cases in Equity 187 (side Page) 4 Kent Comm 324 (side page) and authorities therein cited)

In Downing vs Rogers 21 Wend 178, Cowen J. says "The rule seems to be well established

that in the exercise of a public as well as a private authority, whether it be ministerial or judicial, all the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed." Defects in the execution of such powers will not be aided in equity. (Moreau et al vs Detchemendy et al 18 Mo R 522. Speck vs Wholein 22 Mo R 310)

The question whether the powers granted to Evaline Watts by the act approved Feb 9th 1847 were revoked or annulled by her marriage need not be discussed here, as it is admitted that she ceased at once to exercise them. By an act approved January 28 - 1849 amendatory of the act approved Feb 9th 1847 the legislature conferred upon Wm C Boon alone the power to sell the real estate of Benjamin Watts deceased, without requiring him to give bond, in fact, the law itself is silent upon that subject (Laws of Mo 1848-9 Page 89)

The pleadings admit that the sales made by Boon and for which that defendants are sought to be charged, were made under the

38 last mentioned act.

An attempt is here made to hold responsible the securities of Evaline Watts and William C Boon on their joint bond given in pursuance of the act of Feb 9th 1857 which conferred upon them joint power, for the devastavit of Wm C Boon committed while ~~exer~~ exercising the powers granted to him under the law of 1859

The liability of sureties is strictly construed and never extended beyond the strict letter of the obligation into which they have entered.

An individual may be willing to guarantee the fidelity of two persons while acting jointly, when he could not be induced to become responsible for the conduct of one alone, even though he be employed to transact the same business.

Before signing the bond the sureties would naturally look into the law authorizing their principal to act in order to ascertain the nature and extent of the power they could exercise. This would inform them of the character of the obligation they were contracting. It can not be supposed that they undertook, or would make themselves liable for the conduct of

Boon while exercising the powers granted to him under a law passed two years subsequent to their ~~signature~~ signing the bond. The liability of the surety can only attach while the principal is employed in the discharge of the duties which the law gives him a right to perform.

In the case of The State vs Hedary et al 17 Ohio R 565, Reed, J. said "that the bond speaks for itself; and the law is that it shall so speak; And that the liability of sureties is limited to the exact letter of the bond. Sureties stands upon the words of the bond and if they will not make them liable, nothing can. There is no construction, no Equity against sureties. If the bond can not have effect according to its exact words, the law does not authorize the Court to give it effect in some other way, in order that it may prevail.

It is not like a grant, where every thing is construed most strongly against the grantor and where the intent governs, and will be sought often from the object, or ~~executed~~ Extrinsic facts, to give such Con-

struction to words as to carry into effect the intention of the parties"

In Evans vs Bradly 17 Wend R 422, the Court held that; - "Where there is no uncertainty upon the face of the instrument or where in cases of doubt, we have ascertained the ~~law~~ true meaning of the contract, the liability of a Grantor or surety can not be ~~extended~~ extended by implication or otherwise.

The case must be brought strictly within the terms of the guaranty, or the guarantor will not be liable. Again in Hunt vs Smith 17 Wendel R 180. Cowen, J. says "the terms of the guaranty must be exactly pursued or the ~~Grantor~~ guarantor is not liable at all". In the case of, the Bank of Steubenville vs Caswells administrators 6 Ohio R 214, it is said "no principle is ~~better~~ better settled at the present day, than that a surety can not be further bound than by the terms of his undertaking"

See also Palmer vs Yarrington 1 Ohio State R. 240, State vs Cutting 2 Ohio St. R 69 - Story on Cont. sect 8 & 7, Wabath vs Thompson 6 Hill 540

41

our own Supreme Court have had this question under consideration and have ~~decided~~ discussed it at some length. In the case of Blair vs Perpetual Insurance Company 10 Mo R 566, Judge Scott quoted from the case of Miller vs Stewart 9 Wheat R 702 that "nothing can be clearer, both upon principle and authority, than the doctrine that the liability of surety is not to be extended by implication beyond the terms of his contract.

To the extent, and in the manner and under the circumstances pointed out in his obligation, he is bound and no further. It is not sufficient that he sustain no injury by a change in the contract, or that it may be for his benefit.

He has a right to stand upon the very terms of his contract" Again he quotes "It has been held, that if a person engaged as a surety to a particular individual, the engagement is understood to be only to that individual, and it ceases if he takes a partner, or it will not extend to matters in which his partner is interested" Wright vs Russell 2 Black. 934. "In

if a person engage as surety to several individuals, the engagement is understood to be to all of them collectively and jointly, and if any of them die, it will not be available in respect of transactions afterwards by the survivors (Weston vs Barton 4 Taunt 673, see also 2 Pars on Cont. 13 to 21 & notes)

Other points were presented by Counsel, but we think they were such as naturally arose out of the points already discussed in this opinion, therefore we will pursue them no further.

We are of the opinion that the answer sets up a complete defence to the second breach lied in plaintiffs petition and that the Court committed no error in in overruling the demurrer.

The Judgement of the Circuit Court is affirmed. Judge Burkhart concurs. - Judge Wilson dissents

R A DeBolt
Judge

43

And be it further remembered that at the said July Term of the 4th District Court AD 1868, it being the 3d day thereof and July 22d — the following proceedings of Court were made a part of the record in this Cause which record is in words and figures as follows to wit —

State of Missouri to the use of Watts' heirs et al — Appellants

vs

Wm C Boon et al — Resp't —

Order for an Appeal to S. C.

Now ~~at this day~~ again comes the appellants by their atty and prays for an appeal to the Supreme Court of Missouri, which ~~motion the Court having heard and duly considered, ordered to be sustained and~~ the Court ~~appeal~~ granted ~~by agreement~~ by agreement of parties without affidavit or appeal bond and the appeal operates as a Supersedias

State of Missouri } Set
4th District Court }

I, W. C. Barr, Clerk of the 4th District Court, in the State of Missouri, do hereby certify that the forgoing pages is a true and complete transcript of the proceeding & ~~things on~~ record ~~& file~~ as had in the said 4th District Court in the Cause wherein the State of Missouri to the use of Hamton B Watts et al are appellants and William C Boon et al are respondents, as truly and fully as the same now remain of record and on file in my office

Given under my hand and the seal of said 4th Dis. Court at office, at Macon City on this the 8th day of Jan. 1869

W. C. Barr - Clerk

Contents of Case —

Transcript from Howard Circuit Court — — — — Pages 3 to 27

Petition — Pages 3 to 12
Bond of Respondents — Page 12 to 19
Answer — " 19 to 23
Demurrer — " 23 – 24

Assignment of Error — 28 – 29
Judgement below affirmed — 30
Opinion of Court — 31–42
Appealed to S. C. — 43

Bill of Cost for making up Transcript to Supreme Court
W. C. Barr, Clerk. 8400 words $12.60
" " " Seal — .50
$13.10

1

State of Missouri to use of Hampton B. Watts, Carrie Watts, Louisa Watts, and Rowana Watts by their Guardian Horace Kingsbury, appellants

vs

William C. Boon, John L. Morrison, Chas. E. Givens and John Davis, Respondents.

Howard Circuit

Filed January 14/69
N. C. Burch
Clerk

$10 paid
by John B Clark

Supreme Court

The State to the use of Hampton B Walls et al
by their guardian Horace Kingsbury appellant
vs
William C, Roon et al Respts

The appellants by their Attorney come
and say that there are manifest
errors appearing in the record
and proceedings in this cause in
the district court of the fourth
district of the State of Missouri
to wit
1st The district court affirmed
the judgment of the Circuit court
in the said Cause when by the law
of the land the said district court
ought to have reversed the judgment
of the said Circuit Court in
said cause

2nd
The ~~fou~~ said district Court gave
judgment for the respondents when
the judgment should have been
given for the appellants for
which errors & others appearing on
the record this court is asked to
reverse the judgment of the said
district court &c

Clark & Napton
for appellants

State to use of Watts.
Heirs, } No 1.
vs }
Wm C Boon, et al ~~Clk~~

Assignment of Errors

Filed July 3rd 1869

N. C. Burch
Clerk

In the Supreme Court
July Term 1869

State in use H. L. Watts et al
vs
Charles E. Givens et al

This is a suit brought in the name of the State to the use of H. L. Watts & others by their Guardian Horace Kingsberry against the defendants William C. Boon Charles E. Givens Joseph Davis & Jno L. Morrison on a bond given by William C. Boon & Evelina Watts as principals and C. E. Givens Jos Davis John L. Morrison & Jno. W. Talbot Securities to the State of Missouri for two hundred thous and Dollars with a condition reciting that William C. Boon administrator and Eviline Watts administratrix were authorized and impowered to sell all the lands belonging to the Estate of Benj Watts deceased by an act of the Legislature of approved 9th Feby 1857 & conditioned that said Boon & Watts would faithfully comply with & perform the duties enjoined by

said act.

The petition alleges that said Boon & Watts as administrators sold a large amount of lands, and on settlement made, there was the sum of $9.499.04 found due the heirs of said B Watts, four fifths of which to wit $7.599.24 was due these plaintiffs, and which the Court ordered said Boon & Watts (now Carson) to pay them, and which they have failed to pay, and this constitutes the first breach.

The plaintiff further alleges that after Evelina Watts married George Carson, said Boon alone without the concurrence of of said Evelina Watts sold other lands of said Estate under said act and on settlement made by him of the sales so made by him, there was found due by him to said heirs for lands sold and interest, & which the Court ordered him to pay to said Heirs $47.723.48, of which 4/5th or the sum of $38.178.76 cts is due these plaintiffs, and the second breach of the bond alledged is.

that said Boon has not paid this sum.

The defendants Charles E Givens, Jo Davis & J. L. Morrison answered denying that any lands were sold by Boon and Watts, or either of them as administrators of Bwatts, deceased or that they gave bond as such, but that they gave bond and sold the lands that he too sold under the act of 9th of February 1857

The Defendants deny that the settlement made by them was made as Administrators, but was made under that act - and they state that they were only liable for the sales of lands made jointly by the said Boon and Watts under the said act of the Legislature, they being only sureties on said bond and not principals - They deny that the said Boon had any power under the said act of the legislature, or under the Bond sued on to make seperate sales of any lands without joining the said Evelina Watts in said sales - They deny that the said Boon made any sales under said bond, but they charge that the sales referred to by Plaintiffs as being made by said Boon alone, were made

under an amended act of the Legislature approved 20th of January 1859, and that these defendants were not liable for his said acts in making sales, etc, under said amended act of the legislature - they deny the said sales were made under said bond and deny that the separate acts of sale that were made by the said Boon alone, and his failure to account for the same, or to comply with any orders of the Court in reference thereto, or to pay over money arising from said separate sales found against him on settlement, were any breach of said bond - they deny that the settlement made by Boon alone was made by him as administrator, but was made under and by virtue of the said amended act, and these defendants are not liable therefor - To this answer the Plaintiffs filed a demurrer upon the ground that the answer constituted no sufficient defense to the Plaintiffs action. Upon the hearing the demurrer was overruled, and judgment was rendered by the Court for the Plaintiff for the amount of the sales made by Boon & Watts together

and for the Defendants for sale the sales made by Boon alone, and Plaintiffs brought the case here by Appeal to the District Court which affirmed the judgt of the Circuit Court & the plaintiff appealed to this court

Points and authorities
by Prewitt

1st The demurrer admits the truth of the facts stated in the Defendants answer, and the only question in the case is whether the Securities are liable on the bond for sales made by Boon alone, under the amended act of the Legislature of the 28th of January 1859, for the demurrer admits that the sales were not made under the act of 1857 but were made under the act of 1859

2nd The liability of Sureties is strictly construed, and where they give bond for the act of two they are not liable for the act of one.

Story on Contracts Sect. 867
Blair vs. Perpetual Ins. Co 10 Mo. R. 566.
Wabash vs Thompson 6 Hill N.Y. 540
Chitty on Contracts 524.
State vs Medary. 17 Ohio 565

McGovney vs State of Ohio. 20 Ohio 97

3rd Neither Boon and Walls together, nor Boon alone, sold as administrators - The act of 1857 did not require them to sell as administrators -
The money arising from the sales was not required to be placed with, or accounted for, among the monies of the administration -
The word "Administrators" is only a descriptio Personarum
They were in fact Donees of a power for the benefit of the heirs of Benj Walls dec. having a naked discretionary power to sell the lands belonging to Walls' heirs for their benefit - The act is declared to be made for the benefit of the heirs of Benj Walls dec - The money arising from the sales was the bounce out for the benefit of the heirs, on the order of the Court and was not to be accounted for as the

monies arising from the administration are,
~~[illegible]~~
~~[illegible]~~

Session acts 1856 & 7. page 190
Do 1858 & 9 — 89.
7 Mo. R. 351
12 Mo. R. 541
4 Kent Side p 326.

4th — Naked and discretionary powers given to parties by name, even when given by the party owning the property, must be exercised by the parties to whom the powers are given, — Such powers cannot be exercised by one of them and do not survive
Hunt vs Rousmanier 8 Wheaton 174
Hill on Trustees Side Page 489
Sharpstein vs. Tillou 3 Cowan 651.
Jackson vs. Schauber 7 Cowan 187
4 Kent 326 Side page
Lewin on Trustees 447-8, 449

5th Statutory powers authorizing the transfer of the property of another are always strictly construed — Such powers must be exercised by all the parties on whom they are conferred — All the formalities of

the Statute must be complied with -
Such powers do not survive and no
defects in the Execution thereof will
be aided in Equity.
Bright vs. Boyd 1st Story C.C. R. 478. 486
Moreau vs. Detchemendy 18 Mo. R. 522.
Speck vs. Wohlien 22 Mo. R. 310.
1st Story Equity Sect. 96 & 177
Olmsted vs Elden 1st Selden N.Y. R. 144.
Sherwood vs Reade 7 Hill N.Y. R. 431.
Powell vs Tuttle 3 Com. N.Y. R. 396.
Fowler vs. City of St. Joseph 37 Mo. R. 237
Thatcher vs Powell 6. Wheaton 119
Ellet vs. Paxson 2 Watts & Sergeant R. 418
1st Lead. Cases in Equity ~~Lin Roger 187~~ 217.
9 Watts & Sergeant 56
Smith vs Hileman & Scammon 325.
Geter vs commiss of Tobacco. 1 Bay 354
Souter vs Sea Witch. 1 California 162

6th Boon and Mrs Watts might have continued to sell jointly under the act of 1857, notwithstanding her marriage - but Boon could not sell alone under that act - He did not sell under that act as the Demurrer admits, but sold under the act of 1859 The Securities cannot be held liable for sales made by Boon under a power subsequently conferred on him by the Legislature

4th Kent Com. side page 325 & authorities referred to on 2d point

7th The act of 1857 conferred no power on Boon alone to make separate sales, & hence the necessity of the act of 1859 which does confer on him for the first time a new power & the two acts taken together shew conclusively that he had no such power under the first act

1

State in use watts et al

V

W. C. Boon et al

Brief for

appellant by

Prewitt

~~Filed July 21st 1869~~

~~W. C. Bass~~

~~Clerk~~

Filed July 6th 1869

W C Burch

Clerk

In the Supreme Court.

January Term 1869.

The State of Missouri to the use of Watts and others — Appellants

vs.

Boone & others — Respondents.

Appeal from the 2nd District Court in the above cause, taken to that Court from the Howard Circuit Court. — — — — — — — — — — — —

Statement —

The Legislature of this State on the 9th of February 1857 passed an act entitled, — "An act for the benefit of the heirs of Benjamin Watts deceased" — The 1st section reads as follows —

"1. Evalena Watts administratrix and William C. Boone administrator of the estate of Benjamin Watts deceased, of the County of Howard, are hereby authorized and empowered to sell and convey all the real estate belonging to the said Benjamin Watts at the time of his death lying in said County of Howard."

The 2nd, 3rd, 4th, and 5th sections prescribe the manner &c of the sales and that they are to report and account to the County Court of Howard County for proceeds of sales &c. and the 6th last section reads as follows, to wit. Section 6th. "Said County Court shall require said administratrix and administrator, before making a sale of any real estate

" under this act, to give bond and security, to be approved
" by said Court, sufficient to secure to said heirs the
" full amount for which said real estate ~~shall~~ may be sold,
" together with interest thereon until distribution; and
" said Court shall have full power to make all such
" orders as may be necessary to carry this act into effect,
" and to secure the faithful and proper application and
" distribution of the proceeds of the sale of said real estate,
" and to enforce the proper discharge of the duties required
" by this act." —

(☞ See Laws of Missouri 1856-7 page 196.) Under said act of the Legislature Evalina Watts and William C. Borne executed the following bond. to wit —

" Know all men by these presents, that we Evalina
" Watts and William C. Borne as principals and John
" A. Talbot, John L. Morrison, Charles E. Givens and
" Joseph Davis as securities are held and firmly bound
" unto the State of Missouri in the sum of two hundred
" thousand dollars for the payment of which well and
" truly to be made, we bind ourselves, our heirs, executors,
" and administrators jointly and severally, firmly by these
" presents — signed and sealed on this 18th day of
December 1857.

" The condition of this bond is as follows; The above
" named Evalina Watts and William C. Borne admin-
" istratrix and administrator of the estate of Benjamin
" Watts deceased, by an act of the General Assembly of
" this State entitled, "An act for the benefit of the heirs of

" Benjamin Watts deceased" approved February 9th 185[illegible]
" have been authorized and empowered to sell and convey
" all the real estate of said Benjamin Watts lying in
" Howard County. Now if said Evalina Watts ~~and William~~
" ~~C. Boone~~ administratrix and William C. Boone Admin
" istrator as aforesaid shall in all things faithfully comply
" with the said act of the General Assembly, and discharge
" all the duties enjoined upon them by law or the order or
" decree of any Court having jurisdiction touching the sale
" of said real estate or any part thereof, and faithfully man
" age pay and distribute the proceeds of the sales of said
" real estate, this bond to be void - Otherwise to remain in
" full force and virtue.

Witnys

Evalina Watts (Seal)
William C. Boone (Seal)
John A. Talbot (Seal)
John L Morrison (Seal)
Charles E. Givens (Seal)
Jo. Davis (Seal)

After the execution of this Bond, Evalina Watts and William C. Boone under the power conferred upon them made joint sales of some of the real estate, amounting to some nine thousand dollars, and at the April Term 1868 of the Howard County Court, they made a final settlement shewing a balance due from them on account of their joint-sales of about nine thousand dollars. The non-payment of this amount constitutes the first count or breach in Plaintiff's Petition of the foregoing bond sued on in this case - About a year after the passage of said act and after

Evalina Watts and William C. Boone had made said joint sales under said act and bond. Mrs. Evalina Watts intermarried with Carson and afterwards on the 28th of January 1859. the following amendatory act was passed by the Legislature, entitled "an act to amend an act entitled "an act for the benefit of the heirs of Benjamin Watts deceased": approved February 9th 1857.

Section 1. William C. Boone administrator of Benjamin
" Watts deceased, is hereby authorized and empowered,
" to make all sales and conveyances of the real estate
" of Benjamin Watts deceased, under and by virtue of
" the provisions of the act to which this is amendatory, as
" fully as the said Boone as administrator and Evalina Watts as
" administratrix, could have done under the said act,
" before the letters of administration of said Evalina Watts were
" revoked by her marriage; and all sales of real estate
" made by William C. Boone as administrator since the
" marriage of Evalina Watts, in accordance with the act
" aforesaid, and approved by the County Court of Howard
" County", shall be as valid and binding as if made by
" the said Boone and Evalina Watts, before the marriage
" of the said Evalina Watts, by which her letters of
" administration were revoked."

" This act to take effect and be in force from its passage".

See Laws of Md. 1858-9 - page 89.

After the intermarriage of Mrs. Evalina Watts

with Carson, ~~Boone alone made some sales of real estate; and~~ and after the passage of the amendatory act; Boone alone made a large amount of sales amounting to some forty odd thousand dollars, and for these separate sales so made by him, Boone made his individual reports to the County Court as having been made under the amendatory act; and for such separate sales on a settlement made by him he was found to be indebted in the amount of forty odd thousand dollars by the County Court of Howard County at the April Term 1868.

The plaintiff in this suit ignores the existence of this amendatory act, and in the 2nd count or breach set forth in the petition, alleges and sets forth the non-payment of the amount of these seperate sales so made by Boone alone, and so found to be due from him on his settlement in the Howard County Court as a breach of the said Bond given under the original act.

The defendants Morrison, Givens, and Davis filed a joint and separate answer, alleging that they were merely securities on the Bond sued on — And admit their liability for the amount of the first breach relied on in Plaintiff's petition, or the amount of the joint sales made by Boone and Mrs. Watts, and found due from them jointly by the Howard County Court —

And to the second breach they answer and deny all liability for the same — They deny that these individual sales made by Boone alone, were made under the original act, or under the bond sued on; but allege that they were made by him not under the bond, but under the amenda-

tory act, and that Boone did not make them under this Bond and had no power to do so; that they were only liable for the joint acts of Boone and Watts, and not for their individual and separate acts of sale made by Boone alone.—.

To this answer the plaintiff demurred - But the Circuit Court overruled the ~~dem~~ demurrer, and gave judgement for ~~the~~ plff. for ~~for~~ the first breach or for the joint sales, and refused to give judgement for the separate sales of Boone, but gave judgement on the demurrer as to these for defendants.

The plaintiff appealed from this judgement to the 2nd District Court, and that Court affirmed the judgement of the Circuit Court; and the plaintiff has brought the case here by appeal

Adams
with Prewitt and Hall
for Appts.

Points and authorities –

1 The power conferred on Mrs Evalina Watts and William C Boone to sell the lands of Watts deceased was a statutory or legal power and being a statutory power it must be taken strictly – and being a joint statutory power, it could not be executed under the orignal act by one alone – The defective execution of such a power cannot be aided in chancery, because the heirs whose rights are to be affected, had nothing at all, to do with the creation of the power: and "nolens volens" if properly executed their title would pass.
See Bright v Boyd 1st Story's Rep. 486 1 Story Eq. Sect. 177. Morcean v Detch=mendy 18 Mo Rep. 530. Speck v Wohlein 22 Mo Rep. 310 Morcean v Brunham 27 Mo Rep. 350 – ~~St Joseph~~ Fowler v St Joseph 37 Mo 237–8 – Boswells case per Hutton. Roll Abr. 379. fol. 6. Cowper 267 2 Burr 1146 Annon 2d Freem. 244. Downing v Rogers 21 Wend. 178 –

2 But this power is not only a statutory or legal power but a mere naked power not coupled with any interest whatever - The donee of the power had no interest whatever in the subject matter over which the power was to be ~~executed~~ exercised - They were in no wise bound to execute the power - It was a mere matter of discretion whether they ever exercised the power - They had no interest either in the power itself or in the proceeds to be derived from its exercise - They could not be compelled to exercise the power - Hence it was a mere naked power not coupled with an interest - Hunt v Rousmaniere 8 Wheat. 174 - 271. 1 American Leading cases 576. 3d Comstock 400. 5 N. Y. (1 Seldens Rep. 144) Thatcher v Powell 6 Wheat. 119. 1 Hill 141. 7 Hill 433.

3. This was not a case of joint trustees, where on the death &c. of one the power would survive. There was no trust and could in the nature of the case be no trust until there was an exercise of the power. Then the proceeds growing out of the exercise of the power would be in their hands as a trust fund and not till then. But it would only be in the proceeds thus arrived by every fresh exercise of the power that any trust could arise. The distinction is, between the power itself, which they may or may not exercise and which they can at their own discretion, as often as they may think proper, exercise as long as any lands remain to be sold, and in the proceeds to be derived from such discretionary exercise of the power.

This joint power was not coupled with an interest nor was it coupled with a trust - but its exercise rested entirely in the discretion of the donees of the power - in such case even when the power is not statutory but is created by the party whose rights are to be affected

by its exercise there can be no survivor-
-ship - Joint naked powers, are by the death
or other disability of one of the donees
extinguished - see 1st Thomas's Coke side page
~~782~~ 738 top page 851. Stewart v Peters 10
Mo Rep. 756.

4 The legislature in the amendatory act
assumed that the marriage of Mrs
Watts revoked her letters of administration
This was undoubtedly true as to ordinary
matters - But was this power given to
them in their representative capacities
as administrator & administratrix
of Watts deceased? Were not these
terms merely a "descriptio personarum"
But if it be admitted that the power
was given to them in their representative
capacity there can be no pretense that
this statutory power was an enlarge-
ment of their ordinary powers as
administrators - and that notwith-
-standing the death resignation or
other disability or the revocation of

the letters of one or both the power could still be carried into effect by the survivor or by an administrator de bonis non. It was no enlargement of their ordinary powers as administrators. but it was a new power in itself, created by statute for the benefit of the heirs alone & not for creditors or others to be executed by the donees jointly & not by one alone, nor by a survivor or a subsequent administrator de bonis. This being the case the marriage of Mrs Watts did not revoke the power. See 4 Kent's com 324. Sugden on Powers side page 180-181-182 top page 235 & 237. And though it was a revocation of her letters as to ordinary matters she would have remained administratrix for this purpose. But whether this is so or not, it is wholly immaterial now to inquire, as no joint sales were made by them after her marriage.

In the creation of this power the Legislature assumed that these lands were not necessary for payment of debts. Otherwise the act would have been unconstitutional as impairing the contracts of the deceased. hence it was no enlargement of the administrators. See Currar v State of Arkansas 15 Howard 312.

5th The bond in suit was not an administrator bond. It was not given to perform their duties as administrators. but to account for the monies coming to their hands by any exercise of the power

under the original act - Hence the only parties interested in the bond are the minors whose rights were to be directed - and although executed to the State of Missouri for their benefit it would have been as proper, and perhaps a stricter compliance with the law to have executed the bond directly to the minors - This bond was given for the joint acts of Mrs Watts & Boone and not for the separate acts of Boone alone - These parties are merely securities on this bond - and their liability cannot be extended beyond the its obligations. They did not undertake to be liable for Boone's separate acts of Sale - "It is not so nominated in the bond". ⊃ see Nolly et al v Callaway County Court 11 Mo 463 - ✱ ⊃

If the Legislature by the amendatory act had attempted to increase or extend their liability to the separate acts of Boone, such a law would have violated both the contract, and would have been contrary to both the State and Federal constitutions -

⊃ ✱ see also State v Medary 17 Ohio 565 Hunt vs Smith 17 Wend. R 180 Bank of Steubenville vs Caswells admrs 5 Ohio 214. Blair v Perpetual Ins. Co. 10 Mo Rep. 566. - Miller v Stewart 9 What. 702 -

Wright v Russell 2 Black. 934. Preston v Barton 4 Faunt. 673 –

6th But the sales made by Boone alone were not made under this bond nor were they made under the orignal act but were made by him under ~~under~~ the amendatory act. These facts are set up in the answer and are admitted by the demurrer. By the amendatory act the Legislature conferred upon Boone a new power not conferred by the orignal act to make separate sales of the lands not sold by him & Mrs Pratts and conferred such ~~sales~~ separate sales as Boone may have made after her marriage – No bond is required of Boone under the amendatory act – The Legislature had become satisfied to trust him without a bond to sell and pass the title to the unsold lands – It was not the intention of the Legislature to make these securities responsible ~~liable~~ for the separate sales made or to be made by Boone alone – The amendatory act does not look to any such thing; and if the Legislature had done so in express terms such a law would have been

unconstitutional & void - The very fact that Mrs Watts under the original act was a joint owner of the power induced them to sign the bond - which was given with no eye to any change or alteration of the original law - and the contract as entered into by them cannot be varied enlarged or impaired without their consent -

Mark Adams
for Respts -

1

The State of Missouri
to the use of W. B.
Watts & others
vs
Jno. C. Boone &
others -

Brief by Adams
for Plaintiffs

Filed July 6th 1869
N C Burch
Clerk

The appellants present the following points and rely upon the following authorities to reverse the judgment in this case

1st This bond was executed by Boon and Mrs Watts as administrators of Benjamin Watts. estate. The Special act of the Legislature so treated them and the bond in terms so states. the securities therefore when they executed the same done so as the securities of Boon and Mrs Watts as administrators and as such by their undertaking become liable not only for the joint devastavit of both administrators. but for the devastavit of the survivor just as much so as if committed during the existence of the joint administration.
The securities signed the bond with the knowledge that their principals were administrators that either were liable to die. to be removed. to resign or to have his or her letters revoked and that in such event the law

empowered the Survivor to proceed with the business or trust the same as before the occurence of such contingency. Such an event must therefore be regarded as in the view of the Securities when they signed the bond. they bound themselves to make good the devastavits of the Survivor at the time they endorsed for both — this doctrine is established by this Court in the case of Dobbyns v^s Mc Govern 15th M Rep P. 665

2nd At the time the Special act was paped under which this land was sold and this bond was given Boon and Mrs Watts were the administrators of Watts as such they were clothed with power to sell the land of the deceased under some circumstances viz: for debts &c. but not as provided by the Special act. The Special act of the Legislature is therefore only an enlargement of power to them as administrators. treating them as such. and is not a power

given them as strangers to the estate. but is given to them in their official charactor. it is therefore an extention of power coupled with an interest. and is not in the nature of a naked common law trust. and the serviving administrator can sell under the act as survivor regulated by the general administration laws of the state as to the duties of surviving administrators - see White vs Taylor 1 Yates 422. Sharp vs Pratt 15 Wend 610. Tobrick vs Smith 3rd Benn 69. Diggs vs Jarman 4th Harris by McHenry 48 &c

3nd Upon the marriage of Mrs Watts her letters and powers as administratrix were by law revoked and become void Boon was by the terms of the general statutes governing administrators and also by the perview of the special act was intrusted with the powers given to both no special act was therefore necepary to empower Boon to sell the land according to the terms of the special statute it was already the law. The act of 1859

did not change Boon's responsibility. it recognized - It declared that all sales made by him according to the provisions of the first act should be valid. If valid, if they bound the estate they surely bound the securities and if the securities were at any time dissatisfied they had power at any time to apply to the court for relief which were at all times open. But they do nothing. the court does nothing. the legislature in the second act does not require a new bond in fact it was not at all necessary if the old bond was sufficient to secure the heirs. the land is sold. the money is wasted. the securities say nothing. the heirs cannot act. now when they sue upon the bond the securities contend they are not bound. Will the court permit such cruel injustice to infant heirs. See

J. B. Clark & son
for appellants

L

The State to use of Watts et al

vs 3

B. Dr & others

Briefs & authorities for appellants by Clark & Son

Filed July 7th 69

N C Burch
Clk

Supreme Court.
Jefferson City.
January Term 1868.

The State of Missouri to the use of Hampton B. Watts & others by their guardian Horace Kingsbury, Appellant

vs.

William C. Boon & others his securities, Defendants

Benjamin Watts some time prior to the 26th of September 1857 died intestate leaving a widow Evalina Watts and five children all of whom were then under the age of twenty one years.

On the 26th of September 1857 Evalina Watts (the widow) and William C. Boon were appointed administrators of said Watts and qualified and executed bond, with security as such administrators.

That after the administration was granted, the widow Evalina Watts intermarried with George H. Carson by vriture of which her letters of administration were revoked

On the 9th of Febuary 1857 the

Legislature of Missouri passed an act "entitled an act for the benefit of the heirs of Benjamin Watts deceased" approved on the 9th of February 1857. by which act the Legislature authorized and empowered the said Evalina Watts (now Carson) and William C. Brown. administrators of the estate of Benjamin Watts deceased. to sell and convey all the said real estate belonging to said Benjamin Watts at the time of his death. lying in Howard County in the manner and upon the terms prescribed by said act. That said act among other things provided. that the County Court of Howard County should require said administrators before selling any of said real estate to give a bond with security to be approved of by the said Court. sufficient to secure to the heirs of said Watts the full amount of which said real estate might be sold together with interest thereon

until distribution
That in pursuance of the requirements of said court the said Evalina Watts and William C. Boon as administrators of the estate of Benjamin Watts with John A. Talbot John S. Morrison. Charles E. Givens and Joseph Davis as their securities made their bond in the penal sum of two hundred thousand dollars conditioned in the usual form which bond was approved by the county court.
That the said Evalina Watts and William C. Boon before her marriage as administrators by authority vested in them made sales of large amounts of real estate of said Watts and conveyed the same as administrators
That in april 1868 the said Evalina Watts (now Carson) and William C. Boon made a settlement with the county court of Howard county of the amounts received by them for the sale of real estate before the marriage of the said Evalina Watts. By which

it appears that there is in their hands. due the heirs of Said Watts the Sum of nine thousand four hundred and ninety nine dollars and four cents for Sales of real estate before the marriage of Mrs Watts. and the Circuit Court made an order of distribution of the Same among the heirs: that no part of the Same is paid. That in april 1868 the Said William. C Boon made a Settlement with the Court for money received by him for real estate Sold by him Since the marriage of the Said Evalina Watts and Since her administration was revoked. by which it appears that there was in his hands and due the heirs the Sum of forty Seven thousand Seven hundred and twenty three dollars and forty eight cents. which Sum was ordered to be distributed and paid by him to the heirs: that no part of the Same is paid
That the Heirs by Kingsburry their guardian instituted this Suit in the Howard Circuit Court

against Boon and his Securities on the bond above discribed to recover the Sevoral Sums received before as well as after the marriage of Mis Watts

The defendants appeard and made the following answer viz: "That the act of the Legislature of the 9th of February 1857 referred to by plaintiffs conferred upon William C. Boon and Evalina Watts in their individual capacities and not as administrators a joint Statutary power to Sell and convey the Lands of Said Benjamin Watts decd Situate in Howard County by reference to which act of the Legislature it will be seen that Said Statutary power could not be executed by one of the Said donors of the power alone and the Said bond given by them under Said act of the Legislature was not a bond given by them as administrators but was given under Said act (as by reference to the Said bond

a copy of which is annexed to the petition will more fully appear and these defendants charge that they were and are only securities and not principals in said bond, and that by virtue of said bond they are only liable for the joint acts of the said Evaline Watts and William C. Boon and not for the seperate acts or acts alone of the said Boon. and they state that they were only liable for the sales of said lands made jointly under the said act of the Legislature by the said Evaline Watts and William C. Boon They further deny that the said Boon had any power or authority under said act of the Legislature or under said bond sued upon in this case to make seperate sales of said lands without joining the said Evaline Watts in said sales, and they deny that said Boon did under said bond sued on make any such sales. But they charge that the

Sales referred to by plaintiffs as being made by Said Brown alone were made under and by virtue of an amended act of the legislature of the State of Missouri approved January 28th 1859. and that these defendants are not liable for his Said acts in making Sales under Said amended act of the Legislature. That Said last mentioned Sales were not under Said bond and could not be made under Said bond Sued on, and Said Seperate acts of Sale is made by Said Brown alone and his failure to account for the Same or his failure to comply with the orders of the County or circuit court in reference to Said Seperate Sales or his failure to pay over the amount of Said Seperate Sales So found against him on Settlement are no breaches of Said bond Sued on as charged by Said plaintiffs. and the defendants deny that the Said Settlements referred to by the

plaintiffs were made by the said Boon and Watts as administrators of Benjamin Watts deceased. But they charge that the said settlement first referred to by plaintiffs was made by the said Boon and Evalina Watts not as administrators but was made by them under and by virtue of the said first named act of the Legislature and the said last mentioned settlement referred to as made by said Boon alone was not made by him as administrator but was made under and by virtue of said amended act of the Legislature and these defendants are not liable for the same or any part thereof as hereinafter charged."

To this answer the plaintiffs demurred which was overruled by the circuit court as to the petition in reference to the separate acts of Boon from which judgment the plaintiffs appealed to the District Court. The District Court sustained the judgment of the Circuit Court from which judgment the plaintiffs have appealed to this Court

1

The State to use of
Watts et al

vs ~~Brief~~ Statement
Boon et al

Filed July 7th 1869
N C Burch
clk

W. B. K.

In the Supreme Court of Missouri.

JULY TERM, A. D. 1869.

STATE TO USE OF H. B. WATTS AND OTHERS,

vs.

W. C. BOON, MORRISON, DAVIS, ET ALS.

NAPTON with CLARK, for KINGSBURY.

In the Supreme Court of Missouri.

JULY TERM, A. D. 1869.

STATE TO USE OF H. B. WATTS AND OTHERS,
vs.
W. C. BOON, MORRISON, DAVIS, ET ALS.

This is a suit on the bond of William C. Boon, Evelina Watts, administrators of B. Watts, deceased, and their securities, for failing to account for proceeds of sales of land made by said Boon and Watts, and sales made by Boon, surviving administrator, after the marriage of Evelina Watts, and the consequent revocation of her letters of administration.

The court gave the plaintiffs a judgment for the amount of sales made by Boon and Watts when acting as co-executors, but refused to give any judgment for the $45,778, the proceeds of sales made by Boon alone, after the marriage of said Evelina Watts.

The following is the act of the Legislature of Missouri, authorizing the executors, Boon and Watts, to sell the real estate: adm^r

AN ACT for the benefit of the heirs of Benjamin Watts, deceased.

SECTION 1. Evelina Watts, administratrix, and Wm. C. Boon, administrator of the estate of Benjamin Watts, deceased, of the county of Howard, are hereby authorized and empowered to sell and convey all the real estate belonging to said Benjamin Watts at the time of his death, lying in said county of Howard.

SEC. 2. Said real estate shall, before sale, be appraised by three disinterested householders of said county of Howard,

Under the first named act of 1857, the bond of E. Watts and Boon was given, with Talbot, Davis, Morrison, etc., as securities. That bond is in the following words and figures:

"Know all men by these presents, that we, Evelina Watts and Wm. C. Boon, as principals, and John A. Talbot, John L. Morrison, Charles E. Givens and Jo. Davis, as securities, are held and firmly bound unto the State of Missouri, in the penal sum of two hundred thousand dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, signed and sealed on this 15th day of December, 1857. The condition of this bond is as follows: The above named Evelina Watts and William C. Boon, administratrix and administrator of the estate of B. Watts, deceased, by an act of the General Assembly of this State, entitled 'An act for the benefit of the heirs of B. Watts, deceased, approved February 9, 1857,' have been authorized and empowered to sell and convey all the real estate of said Benj. Watts, lying in Howard county. Now if said E. Watts, administratrix, and W. C. Boon, administrator, as aforesaid, shall in all things faithfully comply with the said act of the General Assembly, and discharge all the duties enjoined upon them by law, or the order or decree of any Court having jurisdiction touching the sale of said real estate, or any part thereof, and faithfully manage, pay over and distribute the proceeds of the sales of said real estate, this bond to be void; otherwise to be in full force and value.

EVELINA WATTS, (Seal.)
W. C. BOON, "
JOHN A. TALBOT, "
JOHN L. MORRISON, "
CHAS. E. GIVENS, "
JO. DAVIS, "

Approved December 15, 1857.
J. SUSHMAN, President.
Filed December 15, 1857.
A. J. HERNDON, Clerk.
Certificates, etc., annexed.

The only question in the case is, whether this bond covers sales made by Boon alone, after the marriage of E. Watts had revoked her letters. Sales were made to the amount of nearly forty-six thousand dollars by Boon, and no additional or other bond was ever given. Upon this point, on behalf of the heirs, I submit the following

POINTS AND AUTHORITIES.

1. The act of 1857 was not a naked power to two individuals in Howard county, disconnected with Watt's estate, but was to the two administrators of that estate, and is to be construed as simply extending the power already possessed by them under the general law to convert Watt's realty into money; and the general law of administrators, which gives the survivor power to do all the acts intrusted to both, was as much a part of the act of 1857 as though it had been in so many words incorporated therein.

2. The authorities cited from New York and from England in reference to naked powers created by act of Legislature or by will, have no bearing on this case, unless it can be made to appear that this was a special power granted W. C. Boon and E. Watts, as persons in whom the Legislature especially confided, and to whom, on account of that special confidence, this trust was granted; and if so, one alone could not execute it. If this construction of the act can be maintained, the conclusion follows that the defendants are not responsible, but this construction is not warranted either by the terms of the act, or its purpose or intent. As to the doctrine of *descriptio personæ*, it is utterly inapplicable; the principal is substituted for the incident, the principal in this case being the administrators, and the *descriptio personæ* being their names.

3. The equity doctrine in regard to powers is stated by Judge Story in s. 1062, and as it really contains the sum and substance of the English and American decisions on that point, I quote the entire section, to show how our statute has modified or rather abolished these refinements:

If descriptio personae, then if Boon & W. were not admrs they could stile act — is this so? for cruci falsa demonstratio non nocet. This is experimentum

"In regard to powers, too, some subtle distinctions have been taken at law, which often require the interposition of courtsof equity. Thus, for instance, it is a general rule of law, that a mere naked power given to two cannot be executed by one, or given to three cannot be executed by two, although the other be dead, for in each case it is held to be a personal trust in all the persons, unless some other language is used to the contrary. Then suppose a testator should give authority to A. and B. to sell his estate, and should make them his executors, in such a case it has been held that the survivor could not sell. But if the testator should give authority *to his executors* (*eo nomine*) to sell, then, if one should die, the survivor, it has been said, could sell. The distinction is nice, but proceeds on the ground that in the latter case the power is given to the executors *virtute officii*, and in the former case it is *merely personal* to the parties named. Now, although this distinction has been doubted, and its soundness has been denied, yet it has much authority also in its support, when the power is deemed at law to be *a mere naked power*. Where the power is coupled with an interest, the construction might be different even at law; but at all events, if the power is *coupled with a trust*, courts of equity will insist upon its execution, upon the principles already stated. Still, however, the construction upon the very words of the particular will might be very important even in equity; since, if the power should survive, it would not be necessary to make the heir join in the sale of the property; if it should not survive, he could not be compelled to join in the sale."

Now our administration law has abolished these nice distinctions, which have perplexed courts of equity in England and elsewhere, for it provides that the surviving administrator shall proceed to execute the trust, whether testamentary or statutory, whenever the letters of the others are revoked by marriage, death, removal, refusal to act, etc.

But if Mrs. Watts was selected without reference to her position as administratrix, and invested with a naked power, as the courts have termed it, how were her letters revoked

by marriage—how was this power taken from her if it was confided to her not as administratrix, but as a special naked power? The Legislature, in the act of 1859, assumes that it was—the County Court of Howard county assumes that it was—and her co-administrator assumes that her powers ceased with her marriage. Yet there is nothing in the law to hinder a married woman from executing a naked power, and it is only by virtue of the administration law that we arrive at the conclusion (a just one, I think,) that her power ceased when she married, as much so as though she had died.

And why was no new bond required on her marriage, if that act destroyed her capacity to sell and convey? Simply because the law recognized the right of her survivor to proceed and act as though she was still acting, and the sufficiency of this bond rendered another unnecessary, under the decisions of our court. The bondsmen were responsible—expressly agreed to be responsible for the acts of either Watts or Boon, or both—Dobyns v. McGovern, 15 Mo. R. 665. The conclusion reached in this case involves the assumption that the securities were responsible, after one of the administrators had died, for devastavits committed by the survivor. It can certainly make no difference in the principle of this decision, whether an administrator dies, is removed, or is married, and so ceases to be authorized to act; in all cases the statute authorizes the survivor to proceed and perform all the duties before vested in the joint administrators, and the case of McGovern decides that the bond given by both applies as well to acts of the survivor as to the original parties. In fact, the securities sign with a full knowledge that such is the law, and there is therefore no enlargement or change of their responsibility whatever.

4. But if Mrs. Watts was a special agent, had a naked power to sell in conjunction with W. C. Boon, and the sales now in dispute were made by W. C. Boon alone, what is the consequence?

The sales were void, and the purchasers get no title. So that land sold and bona fide paid for ten years ago reverts to

the heirs of Watts, and is worth to them two or three times the amount of the purchase money.

The sales which Boon was authorized to make by the act of 1859, were only *such as the act of* 1857 *authorized*, (in accordance with the act aforesaid,) and certainly no sale could be made *in accordance with that act*, unless bond and security was given "sufficient to secure to the heirs the full amount for which said real estate may be sold, together with interest thereon until distribution." So that if the bond is worthless, i. e., would not apply to such sales, no sales were authorized, and the purchasers acquired no title. +

5. This is not the position I take, but it is the alternative to which the securities are driven. The position of the heirs of Watts is, that Boon's sales were valid, and that the securities on his bond are responsible for the proceeds; that the power given by the act of 1857 was not a naked power, but a power to the administrators of B. Watts, and as such was a trust, and governed by the then law of administration, and so understood to be by all parties concerned, and that under that law the power survived. The act of 1859 was a recognition of this construction—a simple declaration of the Legislature that they so understood it, and as such merely declaratory, and sufficient, at all events, to put the securities on their guard, if indeed they differently construed their liability.

6. The whole question turns upon the construction of the act of 1857, as is conceded by the judge who decided this case, and the whole argument to support the construction of the judge is this: "The words administratrix and administrator, as used in the act, are only *descriptio personæ*. If the act had conferred upon the administrators of B. Watts, deceased, the power to sell, even though it afterwards had named them, the trust would have been committed to them in their official capacity; but the act named the two persons to whom is granted the power to sell, not in a judicial capacity, but as *individuals*, and thus it becomes a special authority, expressly confided to them by the statute, and must be strictly pursued."

which proceeds on the assumption proceeds, or a fiduciary — therefore a nullity —

+ & 2nd the sales were also void because Mrs Watts did not forfeit her power by marrying — by a second coverture. The 2nd act

This is the position of our opponents—this is the argument on which the case turned below, and upon which the judgment is expected to be sustained here.

If this can be sustained, the securities are free; if the court can be convinced that this power to sell was given to these two citizens of Howard county, as a naked power to sell, *in invitum*, the lands of Watts, and not because the parties selected were the administrators of Watts, then the power ceased on Watt's intermarriage; but if not, if the power was given to the administrators of Watts, and their names are merely inserted as *descriptio personæ*, then the contrary conclusion is conceded. That the latter is the true construction of the act is, in my judgment, too plain to admit of doubt, and I submit the point without further argument.

NAPTON *with* CLARK,
for KINGSBURY.

+ could not be executed by one

7. What is the difference between a power granted by will to 2 or more executors to sell land granted as this is, by special act of legislature? In the former the survivor takes the power, even in equity & certainly under one statute in the latter why not the same result? It is equally a power coupled with an interest — as all trusts are.

as to wife's power to execute, see
Chance on Powers vol. 1. p. 202 top –
531 side – see also Sugden on Powers
pp 141-142-143-144 &c. law library 13 –
as to married women see Sugden
p. 183 ch. 4.
1 Chance on Powers – p. 42 top – 113 side
p. 180 top – side 477-479

3 The doctrine of descriptio personae as applied by
our Court in the cases cited, was applied to
personal property – which by the common law
belonged to the admr. – but not so real estate
which descends to the heirs – over which
the admr has no power except what the
will – or the general law – or the special
statute confers. In all cases the power
is given to him as trustee, & it is therefore
a power coupled with an interest

As to N.Y. cases, were [illegible] S.W. mere con[illegible]
selling another person's estate, with whom they had
connexion as trustees? They were admrs. & as such,
if the Court had ordered a sale, might have sold
every foot of Walls land under the general law
& the purchasers would have got a good title –
see Overton v. Johnson. 22 Mo R.
There was a will possibly probably a sale
– yet a sale was ordered & the title held good –

[illegible] ad. Watts Heirs

vs

Wm C Boon et. al.

Filed July 17th 1819

N. C. Burch

Clerk

In the Sup Ct Mo
July 7, 1869.

State to use of Watts & others, Appvts
vs
W. C. Boon and others, Res, } Appeal from 4th Dist Ct.

Opinion of the Court

It appears from the record that Evelina Watts was administratrix, and William C Boon was administrator of the estate of Benjamin Watts deceased, in Howard County in this State, and that as such they gave bond according to law, providing for their faithful administration, Subsequently an act was passed by the legislature, approved February 9, 1857, authorizing the said Evelina Watts and William C Boon to sell all the real estate belonging to the deceased Watts. The act is entitled an act for the benefit of the heirs of Benjamin Watts deceased. The first section declares, that "Evelina Watts, administratrix, and William C Boon, administrator of the estate of Benjamin Watts, deceased of Howard County

are hereby authorized and empowered to sell and convey all the real estate belonging to said Benjamin Hall, at the time of his death, lying in said county of Howard". Section 2, requires that before sale, the real estate shall be appraised by three disinterested householders of the county to be appointed by the county court, and provides for securing the purchase money, if the same is sold on credit, and prohibits the sale being made at less than the appraised value. The 3rd section delegates to the administrators power to divide the property and sell in lots at their discretion. By section 4, the administratrix and administrator are required to make a full report of their proceedings, under oath, to the county court, and if the court approve their proceedings they are then directed to make to the purchaser a deed upon full payment of the purchase money, conveying to the purchaser all the right, title, claim and interest held, or which might be held, at the time of such sale,

by the heirs of Watts in and to the real estate. By section 5, it is provided that after paying all reasonable costs and expenses attending the appraisement and sale of the real Estate, the administratrix and administrator shall cause the amount of the money to be loaned at interest, with good security, for the benefit of the heirs, until such time as the County Court shall order a distribution among the heirs. The 6th section provides that the County Court shall require the administratrix and administrator to give bond and security to be approved by the Court, before making any sale, sufficient to secure to the heirs the full amount for which the real estate may be sold, together with interest thereon, and authorizes the Court to make all necessary orders to carry the act into effect, and to secure the faithful proper application ~~and~~ distribution of the proceeds of the sales. Under this act Mrs Watts and W. C. Boone gave an additional bond, aside from their regular bond as administrators of the estate of Watts deceased, with the

defendants as their securities. This bond recites the act of the legislature and covenanted that the principals should faithfully comply with its terms and requirements. After selling a small portion of the real estate, Mrs Watts married, which caused a revocation of her letters of administration on the estate of her late husband Benj Watts deceased. After the marriage of Mrs Watts, the legislature passed an amendatory act, which was approved January 28, 1859. This act consisted of a single section and was as follows: "William C Boon, administrator of the estate of B. Watts, deceased, is hereby authorized and empowered to make all sales and conveyances of the real estate of B. Watts, deceased, under and by virtue of the provisions of the act to which this is amendatory, as fully as the said William C Boon as administrator, and Eveline Watts as administratrix, could have done under said act before the letters of administration of the said E Watts were revoked by

her marriage; and all sales of real estate made by W C Boon as administrator, since the marriage of said E Watts, in accordance with the act aforesaid, and approved by the County Court of Howard County, shall be as valid and binding as if made by the said Boon and E Watts before the marriage of said Evelina, by which her letters of administration were revoked." This amendatory act empowered Boon to sell alone, according to the provisions of the previous enactment, but did not require that he should give any new or additional bond, and none was given. Boon under the authority of the last mentioned act, sold a large amount of the real estate belonging to the minor children of R Watts but failed to account for the proceeds and this suit was brought on the bond given by Mrs E Watts, Wm G Boon and their securities, in accordance with the provisions of the original act. The question is, whether the sureties in the bond can be held

liable for the sole and separate acts of Boon, after Mrs E Watts ceased to act or participate in the matters connected with the sales.

The Circuit Court held that they were not responsible, and this ruling was approved in the district court.

The case must rest upon the construction placed upon the act of 1857. If the act be held construed as to confer upon the administrators of R Watts, deceased, the power to sell the real estate in their official capacity as administrators, then the liability of the sureties is unquestioned. If, however it conferred upon them a mere naked statutory power, giving them power to sell, simply as individuals, it amounted to a personal trust and the act of one would not hold the securities.

By the statute law of this state, if there be more than one executor or administrator of an estate, and the letters of part of them be revoked or surrendered, or a part die, those who remain shall discharge all the duties required by law respecting

the estate, and where the sole administration devolves on one administrator, in consequence of the death or other disability of a co-administrator, the law contemplates that state of things, and the obligation of the bond will not be impaired, but the securities will be held liable, (Dobyns v McGovern 15 Mo 662)

But as a general proposition where a statute gives a power to several persons to do anything requiring discretion, or an exercise of judgment, all must meet and confer, (Wood v Phelps County 28 Mo 119) Numerous questions have arisen, and some of them of much difficulty, in respect to the execution of powers where two or more persons are named as donees, Ordinarily in such a case, all the donees must join in the execution of the power, And this is always true unless the contrary is expressed, (2 Washb, Real Prop 614; 4 Greenl, Cruise, Dig. 211.n; Co Lit, 113, Hargrave's note 146; Story Eq Juris, §1061; Franklin v Osgood, 14 Johns, 553)

In a deed where there was a power of revocation to be exercised by two

persons, one of them died without exercising it, and it was held that the remaining one could not act by himself, and that the power of revocation was at an end, (Montefione v Brown 7 H L Cas, 241). However, where the power is to several persons having a trust capacity, or an office in its nature, like that of the executors of a will, susceptible of survivorship, and any of them die, the power will survive unless it is given to them nominatim, as to the individuals by name, in the latter case the power would not survive unless it was coupled with an interest in the donees of the power, (Co Lit 113 a, Hargraves note, 146; Story Eq Juris, §1062; Painter v Clark 13 Met 220; Peter v Beverly, 10 Pet, 564; 1 Sugd, Pow, 144, 146)

We must determine whether the power to sell the real estate of B Hatts deceased, was given by the legislature to E Hatts and Boon in their administrative capacity, or whether they were donees of a naked power unconnected with their duties

as administrators. The first section of the act names them as administratrix and administrator, and that is really the only thing that has the semblance of connecting them officially with the new powers delegated. They had already administered on the estate in the regular line of administration. The new and extraordinary powers granted by the legislative enactment, were not necessary to perform any duty touching their powers as administrators. The law made ample provision for the sale ~~sale~~ of land, for the purpose of paying demands against the estate, and for the final adjustment of their accounts. But the act does not purport to invest them with power to sell for the benefit of the estate, or for any thing touching the affairs of the estate, but solely for the heirs. It proceeds plainly upon the supposition, that the debts were either paid, or that there were sufficient assets to satisfy them. It is entitled an act for the benefit of the heirs, and every section shows that

the land, the sale and the proceeds exclusively concerns them, and has nothing in common with any interest in the estate, or with anything in reference to its administration. That after E Walls and W C Boon were named as the persons who should be empowered to make the sales, the words administratrix and administrator were affixed does not in the least alter or vary the plain meaning of the act. The words simply designate the persons, and it may have been considered, that Mrs Walls being the natural guardian of the heirs, and her and Boon the administrators of the estate, and understanding thoroughly its condition and the value of the property, and moreover feeling a personal interest in the welfare of the minor children were the most fit and appropriate agents to be entrusted with the important power. It is very clear from the whole context of the original act, that the power was given nominatim, as individuals, and not

in any representative, or official capacity. It will now be necessary to consider the effect of the amendatory act. The act assumes that Mrs E Watts was no longer capable of acting in conjunction with Boon in executing the power, because her letters of administration were revoked in consequence of her marriage, and proceeds to confer upon Boon the sole power, but does not require him to give any new or additional bond.

The idea in the mind of the draftsman of this act was unquestionably that in the execution of the power E Watts and Boon acted in their administrative capacity, and that the power attached to their office, and that the marriage of E Watts, disqualified and disabled her from further acting. But if this were so, the act would have been superfluous and unnecessary, as the power would have survived to Boon by operation of law. But we have seen that this was a mistaken view of the law, and that the parties in executing

their trust were the donees of a mere naked statutory power, In the capacity in which they acted in and about the sale of the realty the marriage of Mrs Stalls was no bar to her continued exercise of the power committed to her in conjunction with Boon, A married woman may be an agent or execute a naked power, The case then stands in this attitude; a joint statutory power is given to two persons, to perform certain acts, and to guarantee the faithful performance and execution of the power, security is demanded and given, One of the donees of the power ceases to act, and the other, in accordance with new authority proceeds to execute the power by himself, ~~and~~ fails to faithfully discharge his duties, and waste ensues, by which the beneficiaries are damaged, Can the securities on the bond, given for the joint acts of both the donees, be held responsible for the wrongful acts of one? The answer to this question must certainly be in the negative,

The liability of the surety cannot be extended beyond the plain terms of his contract. He is bound by the conditions of his obligation and no farther. His undertaking will extend to whatever is comprehended within the scope and limits of his engagement but to nothing more. If a person engage as surety to several individuals, the engagement must be understood to be to all of them collectively and jointly, and if any of them die, or cease to act, it will not be available in respect to transactions afterwards by the survivors, or the persons acting. (Blair v Perpetual Ins Co 10 Mo. 559; Heston v Barton 4 Penn. 573) The sureties in the present case may have been very willing to be bound for Mrs E Watts and Boon jointly, and utterly averse to assuming any liability for Boon seperately. And when the attempt is made to make them responsible for the sole acts of Boon they have a right to stand upon the terms of their contracts, and say that they entered into and

such agreement. My conclusion from the whole case is, that the sureties are not liable, that the judgment of the court below was right and ought to be affirmed.

The other judges concur.

David Maquery

1

use
Hampton B Watts
et al by the Guardian
Horace Kingsbury Appellant
vs

State to use of Watts &c
vs
W. C. Boon & others.

Opinion of the
Court. Wagner.

Filed July 10th 69
N C Burch.

Affirmed