

**Cocke Vs. Halsey**

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**Court :** US Supreme Court

**Decided On :** 1842

**Appeal No. :** 41 U.S. 71

**Appellant :** Cocke

**Respondent :** Halsey

**Judgement :**

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**Cocke v. Halsey**

**41 U.S. (16 Pet.) 71**

*ERROR TO THE CIRCUIT COURT OF THE UNITED*

*STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI*

## **SYLLABUS**

The Constitution of Mississippi declares that clerks of the circuit court, probate, and other inferior courts shall be elect by the electors of the county for two years. The Legislature of Mississippi, by statute, declared that when, from sickness or

other unavoidable causes, the clerk of the probate court shall be unable to attend the court, the judge of probate may appoint a person to act as clerk *pro tempore*, who shall take an oath faithfully to execute the duties of the office &c.; Deeds of trust and mortgages are declared to be void against creditors and purchasers unless they shall be acknowledged or proved and delivered to the clerk of the proper court to be recorded, and they shall be valid only from the time they are so delivered to the clerk. Robert D. Haden was elected clerk of the Court of Probate for the County of Lowndes, and during the two years for which he was so elected, he went to the State of Tennessee on business, and being absent when the court of probate sat, William P. Puller was, by the judge of the court of probate, appointed the clerk *pro tempore*, and having taken the oath of office, he executed the duties of clerk during the session of the court and afterwards until the return of the regularly elected clerk. After the adjournment of the court, a deed of trust, duly executed, by which certain personal property was conveyed for the benefit of creditors was delivered to William P. Puller, and was by him entered for record. An execution was levied on the property thus conveyed by a creditor of the party who had executed the deed; the regularity of the recording of the deed was denied on the ground that the clerk of the probate court *pro tempore* had no authority to receive the deed of trust for record after the adjournment of the court of probate. *Held* that the clerk *pro tempore* was authorized to record the deed of trust under the Constitution and law of Mississippi.

In every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper and is binding until reversed by a superior tribunal, and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. Cases cited, [Thompson v. Tolmie](#), 2 Pet. 157; [United States v. Arredondo](#), 6 Pet. 720; [Voorhees v. Bank of the United States](#), 6 Pet. 473; [Philadelphia & Trenton Railroad Company v. Stimpson](#), 14 Pet. 458.

On 24 March 1838, James Carter & Company executed a deed of trust to William L. Moore for the purpose of securing the payment of certain sums of money to the Commercial Bank of Columbus, by which they conveyed, among other things,

certain slaves, then in Lowndes County, Mississippi, in trust to sell the said property for the benefit of the bank in Columbus. This deed was presented for record to the Office of the Clerk of the Court of Probate for Lowndes County on 24 March 1838, the day on which it was executed, and was endorsed, "Received in my office for record, on 24 March 1838, William P. Puller, clerk *pro tem.* " And it was afterwards certified to have been recorded on the same day, under his hand and seal, by William P. Puller, clerk *pro tem.*

At the time this record and certificate were made by William P. Puller as clerk *pro tempore*, one Robert D. Haden was the Clerk of Probate for the County of Lowndes, duly elected, qualified and sworn. Haden was duly elected in November, 1837, for two years, and entered upon the discharge of his duties sometime in the month of February 1839. Haden visited the State of Tennessee on business, and did not return in time to perform the duties of clerk at the March term 1839. In consequence of his absence, Thomas Sampson, Esquire, judge of probates, upon the opening of the court of probate at March term 1839, appointed William P. Puller to act as clerk *pro tempore* during the absence of Haden. This deed was recorded by Puller, during the absence of Haden but after the March term of the court of probate, not while the said court was in session. Haden afterwards returned and resumed the duties of his office. The above-described property was, by the trustee, left in the possession of James Carter & Company.

At the May term, 1838, of this court, judgment in the above-entitled case was obtained against the said James Carter & Company. Execution was issued upon this judgment and was levied on the assigned negroes in the possession of James Carter & Company. Upon the levy's being made, the trustee came forward and claimed this property and gave the necessary bond, and the issue was now before the Court to try the right to the said slaves.

If the deed of trust was properly and legally recorded, then it was admitted that the judgment in the above case was no lien upon said slaves, and that the trustee would be entitled to the same; otherwise, if the deed was not duly and legally

recorded, the slaves were subject to the satisfaction of the said judgment.

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The court adjudged that the trust deed was not duly and legally recorded, and that the said acts and proceedings of the said William P. Puller, as clerk *pro tempore*, in the recording of the said trust deed was without authority of law and was altogether void, and so instructed the jury. To this opinion the plaintiff excepted, and the jury having found a verdict according to the opinion of the court, the plaintiff prosecuted this writ of error to the judgment of the circuit court on the verdict.

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DANIEL, JUSTICE, delivered the opinion of the Court.

The statement of the case upon which the questions presented here for decision arise is, as agreed by the parties upon the record, substantially the following:

On 24 March in the year 1838, James Carter and Lewis Grigsby, merchants, executed a deed of trust to one William L. Moore as trustee to secure the payment of certain sums of money to the Commercial Bank of Columbus. This deed was regularly acknowledged by the grantors before a justice of the peace on 29 March 1839, and delivered to one William P. Puller, who had been appointed clerk *pro tempore* of the Probate Court of the County of Lowndes in said state, and who recorded the deed in the office of the clerk of probate for said county and endorsed thereon a certificate of record, signed William P. Puller,

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clerk *pro tempore*. That at the time this record and certificate were made by Puller as clerk *pro tempore*, one Robert Haden was the Clerk of Probate for the County of Lowndes, duly elected, qualified and sworn; that Haden was elected in November, 1837, for two years, and entered on the discharge of his duties in the

month of February, 1838; that Haden visited the State of Tennessee on business, and did not return in time to perform the duties of clerk, at the March term of 1838. In consequence of his absence, the judge of probate, upon commencing the court of probate of the March term of 1838, appointed Puller to act as clerk during the absence of Haden. The deed of trust to Moore was recorded by Puller during the absence of Haden, but after the March term of the court. Haden afterwards returned and resumed the duties of his office.

The original trustee, William L. Moore, having died, the Superior Court of Chancery of the State of Mississippi, at the January term 1839, duly appointed Stephen Cocke, the plaintiff in error trustee, in lieu of Moore.

At the May term of the Circuit Court of the United States for the Southern District of Mississippi, the defendants in error obtained a judgment against James Carter & Company. Execution was sued out upon this judgment and levied by the marshal on the property mentioned in the trust deed in the possession of Carter & Company. Upon the levy's being made, Stephen Cocke, the trustee, claimed the property, gave the bond required in such cases by the law of Mississippi, and an issue was duly made to try the right to the property. Upon the trial of this issue, the following question was submitted to the court for its opinion thereon, *viz.*, that if the deed of trust was properly and legally recorded, then it was admitted that the judgment in question was not a lien upon the property conveyed by the deed, and the trustee was entitled to the same; otherwise, if the deed was not legally recorded, the property was subject to satisfaction of the judgment. Upon this question, the court below adjudged that the trust deed was not duly recorded; that the acts of Puller as clerk *pro tempore* in recording the deed were without authority of law, and altogether void, and so instructed the jury. To this opinion of the court thus given the plaintiff in error excepted, and brings that opinion before this Court for examination.

The fourth article of the Constitution of Mississippi, 31, declares that "the judicial" power of that state shall be vested in one high court of errors and appeals and such other courts of law and equity as shall be afterwards provided for in that Constitution. The same article, after authorizing and ordaining various superior tribunals in which the judicial powers shall be vested, at length, in 18, declares that there shall be established in each county in the state a court of probates, the judge whereof shall be elected by the qualified electors of the county for a period of two years. The 19th section of the same article declares that the clerks of the circuit, probate, and other inferior courts shall also be elected by the qualified electors of the county for the period of two years. See *Laws of Mississippi*, by Howard & Hutchinson, 24, 26.

The legislature of the state, in organizing their judiciary, as it was indispensable they should do (as the Constitution had limited its own action to the direction that the courts therein named should be established, leaving their organization and distribution to the legislative authority), by a statute passed in March, 1833, and by 1, 2 and 3 of that statute, established a court of probates in each county of the state; provided for the election of judges and clerks of the several courts; prescribed to them the oath of office they should take, and to the clerks the bonds they should execute, before assuming their official functions. *Laws of Mississippi* 469. By the 8th section of the statute, the legislature declared that in case the clerk of probate

"shall be at any time unable, from sickness or other unavoidable causes, to attend said court, it shall be lawful for the judge of probate to appoint a person to act as clerk *pro tempore*, who shall take an oath faithfully to discharge all the duties of his office,"

&c.; *vide* 470, *Laws of Mississippi*. By the 5th section of the same statute, vacancies in the offices of judge and clerk are to be filled as the original appointments were made, *viz.*, by election. By the fifth section of another statute of Mississippi, concerning real estate and conveyances, passed June 13, 1822, it is declared that deeds of trust and mortgages shall be valid as to subsequent purchasers for valuable consideration without notice and as to all creditors from

the time when such deeds of trust or

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mortgages shall have been acknowledged, proved or certified, and delivered to the clerk of the proper court to be recorded, and from that time only. From this provision the question of priority arises.

In support of the decision of the circuit court, it has been insisted that the power of the judge of the probate court to appoint a clerk of probate *pro tempore* is limited to the term of the court and to the exigencies and necessities of the term, and does not extend to a period beyond the term, nor to any acts performed by the person so appointed, out of court. From this position, claimed by counsel as a legitimate deduction from the statute, it is argued that the clerk, having been appointed by an exercise of power wholly illegal and void -- nay, even without color of authority -- his acts too must be merely void, and not entitled to the effects properly attributable to the acts of one who may be considered as an officer *de facto*, in contradistinction to him whose commission and qualification are in all respects regular, and who therefore may be called an officer *de jure* and *de facto*.

In reasoning from the language of the statute, it would seem difficult to perceive anything in it which limits the appointment *pro tempore* to the session of the court. The expression in the law is "from sickness or unavoidable causes;" now it is quite as probable that these causes would operate beyond as well as during the continuation of the court. The only fair inference deducible from the words of the law is that the causes requiring an appointment should, like the appointment itself, be temporary, so that the provision of the statute should not be perverted to cover a permanent disqualification of the regular clerk, and thereby prevent his removal or the election of a successor, under proper circumstances. The precise duration of that temporary cause it could hardly have been the intention of the lawmakers to define. To ascribe to them an intention to restrict the duties of a clerk *pro tempore* to the session of the court would be imputing to them an act of utterly useless legislation; since none can fail to perceive, on looking into the law, that the duties

of the clerk of probate are as extensive and as important during vacation as they are during term time, if indeed they are not more so.

Several authorities have been cited in argument, some from

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the English and some from the American cases, in order to show that the recording of the trust deed in question by the clerk of probate cannot be supported even as the act of the clerk *de facto*. These authorities, however, do not establish the position they have been brought to maintain, and in some instances they operate directly against it. The first case relied on (and it is a leading case) is that of *King v. Lisle*, Andr. 163, 174. This was a *quo warranto* to remove a burgess of Christ Church on the ground that he had been nominated by one Goldwire, calling himself mayor of the corporation when he had never been appointed mayor. The court said the nomination by Goldwire could not be supported, because he was not, even by any colorable title or pretext, mayor of the corporation, evidently putting his act on the same footing with an attempt at usurpation by any other private person. There is a remark by the court in delivering its opinion which is regarded as not without its bearing upon the present case, and that remark is this,

"That supposing Goldwire was mayor *de facto*, yet the acts here found to be performed by him are not good, because they were not necessary for the preservation of the corporation."

In these cases, the court said

"The proper distinction is between such acts as are necessary and for the good of the body, which comprehend judicial and ministerial acts, and such as are arbitrary and voluntary."

The second case from the English books is that of *Knight v. Corporation of Wells*, 1 Lutw. 509, 519. This was an action of debt against the corporation upon its bond to the wife of the plaintiff, and the objection taken to the recovery was that the

person who put the corporate seal to the bond was not qualified by the charter to be mayor. He had been elected to the office of mayor, however. The case seems to have been much considered, for it was twice argued, and it was resolved by all the court that although the mayor might not be qualified according to the charter, yet he had been elected, and in virtue of his election was mayor *de facto*, and that therefore all judicial and ministerial acts performed by him were good.

The cases of *People v. Collins*, 7 Johns. 549, and of *McInstry v. Tanner*, 9 *id.* 135, are in strictest accordance with the authority from Lutwyche. In *People v. Collins*, the

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court said, in speaking of the powers exercised by the officers whose acts were impeached:

"They were commissioners *de facto*, since they came into office by color of title, and it is a well settled principle of law that the acts of such persons are valid when they concern the public or third persons who have an interest in the acts done, and this rule is adopted to prevent the failure of public justice. The limitation of this rule is as to such acts as are arbitrary and voluntary, and do not affect the public utility. The doctrine on this subject is to be found at large in the case of *King v. Lisle*, Andr. 263."

So too in 15 Mass. 173, *Bucknam v. Ruggles*, this matter is very fully treated. The court said that although the officer did not comply with the requisites of the constitution, yet, having been appointed and thus having color of title, his acts are valid in respect to third persons who may be interested in such acts; that such a rule is necessary to prevent a failure of justice. Besides, the officer's title to his office ought not to be determined in a collateral way. In addition to other authorities to this point is quoted 3 Cruise Dig. tit. Officer, 71, 75, for the principle that by the test and corporation acts, in England, all persons are disabled in law to all intents and purposes to hold certain offices unless they take the oaths required; yet notwithstanding this disabling clause, it has been held that the acts of officers not

qualified by those statutes may be valid as to strangers. The case of [Williams v. Peyton's Lessee](#), cited for the plaintiff in error from 4 Wheat. 77, is thought to have no application to the question now under consideration; all that was ruled in that case was this that where a title depends upon the acts of a ministerial officer to be performed *in pais*, proof of the performance of those acts is necessary to sustain such title -- a principle which none perhaps will dispute, but whether affirmed or denied, cannot apply to the present case. So too the case of *Davidson v. Gill*, cited from 1 East 64, having been ruled exclusively upon a provision of the statute 13 Geo. III., c. 78, requiring that certain proceedings of justices should, in relation to closing and opening ways, in order to give them validity, appear on the face of those proceedings, in a prescribed schedule or form set forth in the statute, is considered as wholly inapplicable.

If, then, the appointment and the acts of the clerk of probate

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depended for their validity upon the principles which apply to the acts of officers *de facto*, a just interpretation of the authorities adduced in behalf of the plaintiff in error gives validity to both. That the judge had power to appoint a clerk *pro tempore* seems never to have been questioned; that he did appoint is equally indisputable; the irregularity alleged is in the failure to limit the appointment to the term of the court. Admit for the present that the appointment should have been thus limited, and that the clerk has admitted the deed to probate, after the term; yet in his character of clerk, was he not within the very definition of the authorities, and within the concessions of the counsel, clerk *de facto*, acting *colore officii*, and must not his acts therefore be valid so far as regards third persons who are interested to them? An affirmative answer to this inquiry is unavoidable.

But the appointment of this officer, and his acts when so appointed, rest upon a foundation still broader and firmer than that which sustains the actings of an officer *de facto*. By the law of Mississippi, the judge had the power to appoint *pro tempore* whenever, from sickness or unavoidable causes, the clerk could not attend. By the investiture of that power, it remained with the judge, in the exercise

of judicial discretion, to decide upon the propriety and necessity for the execution of the power; he did decide upon them, and he must be presumed to have decided properly. The correct legal principle applicable to such proceedings in this: that in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper and is binding until it shall be regularly reversed by a superior authority, and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this Court, as in the cases of [Thompson v. Tolmie](#), 2 Pet. 157; [United States v. Arredondo](#), 6 Pet. 720; [Voorhees v. Bank of the United States](#), 10 Pet. 473, and [Philadelphia & Trenton Railroad Company v. Stimpson](#), 4 Pet. 458. It cannot, then, be permitted in this collateral inquiry to insist that the judge has either misapprehended or transcended his authority; he has exercised the discretion vested

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in him by the statute; that discretion has led to the conclusion that the necessity for an appointment was coextensive with the absence of the ordinary clerk, an absence deemed by him unavoidable, and the discretion of the judge *pro hac vice*, at any rate, must be conclusive. But beyond these legal presumptions, this Court, upon a review of the Constitution and statute of Mississippi, are satisfied, that the appointment of the clerk of probate *pro tempore* was fully warranted in the manner and to the extent in which it was made. They therefore decide that the decision of the Circuit Court for the Southern District of Mississippi is erroneous, and accordingly do

*Reverse the same.*

## **ORDER**

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi and was argued by counsel, on consideration whereof it is now here ordered and adjudged by this

Court that the judgment of the said circuit court in this cause be and the same is hereby reversed with costs and that this cause be and the same is hereby remanded to the said circuit court with directions for further proceedings to be had therein in conformity to this opinion and according to law and justice.

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