47 Neb. 934
Supreme Court of **Nebraska**.

**GREEN**
v.
**BARKER** ET AL.

April 10, 1896.

***Syllabus by the Court.***

1. The presumptions arise, from the existence of a patent, evidencing a grant of land from the United States, that all acts have been performed, and all facts have been shown, which are prerequisites to its issuance, and that the right of the party, grantee therein, to have it issue, has been presented to and passed upon by the proper officers; and such patent is not open to collateral attack.

2. Where property has been conveyed under the provisions of the act of congress of May 23, 1844, which may be termed the "Town-Site Act" (5 Stat. 657), by the United States, to the corporate authorities of a town or city, or a trustee designated by law, a deed executed by the trustee, or the party authorized by law to make the transfer, evidences the determination by the party executing it that all the preliminary steps have been taken and necessary requirements complied with, and that the person to whom the deed runs is the one entitled to receive it; and the question of the validity of the deed cannot be litigated in a collateral proceeding.

3. It is a presumption of law that every person performs his duty as an official until the contrary is shown.

4. A correct designation, in a deed, of the legislative act under and by virtue of which it was executed, *held* not essential to the validity of the deed.

5. A page of a book was identified as a part of the records of the minutes of the meetings of the Grandview Company. *Held* not an identification or foundation for its introduction, as showing proceedings had by the board of trustees of the city of Grandview.

6. Deeds were executed purporting to be conveyances of real property by the trustees of the city of Grandview, which were signed "A. B. Moore, Chairman." *Held* that, without proof that A. B. Moore, who signed the deeds, was chairman of the board of trustees of the city of Grandview, the deeds did not evidence the transfer purported to be made.

Error to district court, Douglas county; Hopewell, Judge.

Ejectment by Joseph **Barker** and others against John **Green**. There was a judgment for plaintiffs, and defendant brings error. Reversed.

West Headnotes (6)

**[1]** **Public Lands**
Execution of Trust in General

The designation, in a deed of a town-site trustee, of an act which had been repealed, as the act under which the deed was executed, was equivalent to the mention of no act.

1 Cases that cite this headnote

**[2]** **Public Lands**
Execution of Trust in General

Where property is conveyed under Act Cong. May 23, 1844 (5 Stat. 657), relating to town sites, by the United States to the corporate authorities of a town or city, or trustee designated by law, a deed executed by the trustee, or the party authorized by law to make the transfer, evidences the determination by the party executing it that all the preliminary steps have been taken, and the requirements complied with, and that the person to whom the deed runs is the one entitled to receive it, and the question of the validity of the deed cannot be litigated in a collateral proceeding.

1 Cases that cite this headnote

**[3]** **Public Lands**
Collateral Attack

The presumptions arise, from the existence of a patent, evidencing a grant of land from the United States, that all acts have been performed, and all facts have been shown, which are prerequisites to its issuance, and that the right of

the party, grantee therein, to have it issue, has been presented to and passed upon by the proper officers; and such patent is not open to collateral attack.

Cases that cite this headnote

**[4]** **Evidence**
Official Proceedings and Acts

It is a presumption of law that every person performs his duty as an official until the contrary is shown.

1 Cases that cite this headnote

**[5]** **Evidence**
Proof of Authority to Execute

A deed signed by one as chairman was not admissible to show a conveyance of title from town-site trustees of a certain town, in the absence of a showing that the signer was the chairman of the board of trustees of that town.

1 Cases that cite this headnote

**[6]** **Evidence**
Public Documents and Publications in General

**Evidence**
Corporate Acts, Records, and Proceedings

A page of a book was identified as a part of the records of the minutes of the meetings of the Grandview Company. Held not an identification or foundation for its introduction, as showing proceedings had by the board of trustees of the city of Grandview.

Cases that cite this headnote

**Attorneys and Law Firms**

***1032** C. A. Baldwin and J. M. Woolworth, for plaintiff in error.

H. D. Estabrook and E. W. Simeral, for defendants in error.

**Opinion**

HARRISON, J.

The defendants in error instituted this, an action of ejectment, in the district court of Douglas county, against the plaintiff in error. The petition filed was as follows: "And now come said plaintiffs, and for cause of action against said defendant say: That said plaintiffs, as tenants in common with said defendant, have a legal estate in, and are the owners in fee and entitled to the immediate possession of, the undivided interests hereinafter appearing of the following described real property, to wit, the block or tract of ground known as the 'Stone-Quarry Reserve' in the city of Grandview, Douglas county, **Nebraska**, and so designated upon the map of Omaha, as lithographed and published by Poppleton & Byers,--said Joseph **Barker** being the owner in fee of 19/100 of said property; John I. Redick, 1/100; George P. Bemis, 2/100; Lewis S. Reed, 4/100; Ferdinand Streitz, 14/100; Andrew B. Moore, 14/100; said Emma I. Jones, as widow of Henry O. Jones, deceased, who died intestate and without issue, of a life estate of 13/100 of said property; and the said Dana G. Jones, Eva S. Jones, and Patty A. Holton, as the owners in fee of the 13/100 interest, said last three named parties being the sole heirs at law of said Henry O. Jones, deceased. But the plaintiffs aver that said defendant unlawfully keeps them out of the possession of said property, and denies the rights of plaintiffs, herein set forth. Wherefore, plaintiffs ask judgment for the possession of the property and costs of suit." To this an answer was filed, in behalf of plaintiff in error, which, first, denied generally each and every allegation of the petition; also, specially traversed them, and pleaded affirmatively as follows: "And, further answering, defendant says that this action ought not to be prosecuted against him for the reason hereinafter stated; that is to say, that this defendant, and those under whom this defendant claims, have been in the actual, open, notorious, and hostile possession and occupation of said premises, and all of it, claiming it as their own, for more than ten years next before the institution of this action. And the defendant ***1033** pleads and relies upon the statute of limitation in such cases made and provided, in bar of the plaintiffs' right of recovery herein. Wherefore the defendant prays that he may be hence dismissed, with judgment for his costs in this action, and that he may have all other relief." To this there was a reply, a general denial. There was a trial before one of the judges of the district court and a jury, resulting in a verdict in favor of defendants in error as to the larger portion of the premises in controversy, upon which, after motion for new trial was heard

and overruled, judgment was rendered. The case is presented here by error proceedings on behalf of the defendant in the trial court.

The defendants in error introduced in evidence a patent, conveying from the United States to "the trustees of the city of Grandview, and as the proper corporate authority thereof, in trust for the several use and benefit of the occupants thereof, according to their respective interests under said act of May 23, 1844, and to their successors and assigns in trust as aforesaid," certain lands, which included the tract in controversy in this case; also, deeds signed by "A. B. Moore, Chairman," and each containing a recital that it was the act of the trustees of the city of Grandview, by which there was purported to be conveyed certain undivided interests in the title to the stone-quarry reserve, together with other property, to parties who, according to the recitals of the deeds, had respectively become entitled to the conveyances; also, conveyances from these last-mentioned persons to others; and transfers were shown until the defendants in error had been reached, and the title to their respective interests vested in them. The several conveyances were objected to at the time they were offered in evidence. The trial judge instructed the jury, in respect to the patent and deeds, and what they established, as follaws: "The plaintiffs have introduced in evidence a patent from the United States to the trustees of the town of Grandview, covering the premises in controversy, and claim title through conveyances received by them or their grantors from A. B. Moore, chairman of such board of trustees; and you are instructed that they have introduced record evidence showing a legal estate in themselves as set out in their petition, and are therefore entitled to recover, unless the defense of adverse possession has been established by the defendant." This was excepted to, and is assigned for error.

In order to a proper understanding of the claims of plaintiff in error that the patent from the United States to the city of Grandview, and the deed made by A. B. Moore as "chairman," did not convey any title, or were not evidence of such transfers, we deem it proper to set forth here portions, at least, of the act of congress to which allusion was made in the patent, and of the acts of the territorial legislature which were passed to carry into effect the law enacted by congress. The act of congress reads as follows: "Whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated for the judges of the county court for the county in which such town may be situate, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust as to the disposal of the lots in such town and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by legislative authority of the state or territory in which the same is situated: provided that the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town and be made in conformity to the legal subdivisions. * * * Provided, also, that any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void and of none effect." 5 Stat. 657, c. 17.

The territorial enactment to prescribe the rules and regulations, which was passed February 10, 1857 (see Sess. Laws 1857, p. 133), is as follows:

"Section 1. That whenever any portion of the surveyed public lands has been or shall be settled upon, and occupied as a town site and therefore not subject to entry under the existing pre-emption laws, it shall be lawful and be the duty whenever required by the occupants and owners by deed, of the lots within the limits of such town, for the corporate authorities of the town, if incorporated, and if not incorporated, then for the commissioners of the county for the county in which such town may be situated * * * to enter at the proper land office the land so settled and occupied as a town site, in trust for the several use and benefit of the occupants, and those holding by deed or otherwise, according to the laws of this territory.

Sec. 2. After the purchase of such land as above described it shall be the duty of the mayor of the town if incorporated, or if the town is not incorporated then of the commissioners of the county in which the town site is situate, to make out, execute and deliver to each person who may be legally entitled to the same a deed in fee simple for such part or parts, lot or lots of such land as each person may be entitled to. * * *"

Section 3 makes provision for hearing and determining disputes between contesting claimants. Sections 4 and 5 we need not notice ***1034** here. Section 6 provided for an appeal to the proper district court from a decision of a mayor or the commissioners.

In 1858, an act was passed, on this same subject, which repealed the act of 1857. See Laws **Neb**. 1858, p. 266. In sections 4 and 5 of the law of 1858 it was provided:

"Sec. 4. After the entry of the land settled upon and occupied as a town site, as hereinbefore prescribed, the corporate authorities or the county judge, as the case may be, having entered the land shall cause public notice to be given of the fact of such entry by posting written or printed notice in at least three public places in the town, and no deed for the land nor any part thereof shall be executed and delivered within the period of thirty days after the first day of the publication of such notice.

Sec. 5. After the lapse of thirty days from the first day of the publication of such notice, the mayor of the town, or if there is no mayor the chairman of the board of trustees, if such town is incorporated, and if the town is not incorporated then the county judge of the county wherein the town is situated, shall on demand, execute and deliver to each person who may be legally entitled to the same, a deed in fee simple, for the part or parts, lot or lots of such land as the person demanding may be lawfully entitled to."

In regard to a patent issued by the proper officers of the United States, it was observed, in the case of Smelting Co. v. Kemp, 104 U. S. 636: "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title; and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration, by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief--indeed, its only--value, as a means of quieting its possessor in the enjoyment of the lands it embraces." Polk v. Wendall, 9 Cranch, 87; Cofield v. McClelland, 16 Wall. 331; Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. 10. The principle is also recognized in Van Sant v. Butler, 19 **Neb**. 351, 27 N. W. 299. The supreme court of Colorado has said, on this same subject: "The doctrine announced was that the deed, upon its face, purported to have been issued in pursuance of the law, and was therefore only assailable in a direct proceeding to set it aside. Another proposition insisted upon it that it was admissible to attack the Hughes deed for fraud in its execution, and for this purpose the offer to prove that Hughes had never filed upon the lot in question should have been allowed. The fraud alluded to is imputed to the probate judge. The language of counsel is: 'That the action of Downing in issuing the deed in question to Hughes was a fraud upon the rights of plaintiff in this case will hardly be questioned.' Whether this charge be true or not, the proposition that, upon this ground, the validity of the deed was examinable in an action of this character, is in conflict with the leading cases on the subject. The doctrine is established by numerous decisions of the supreme court of the United States that, should the officers of the land department, in issuing a patent, err in respect to their duty, as to questions of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause, if, upon any state of facts, the patent might have lawfully issued; and that, against collateral attack, it will be presumed the necessary facts existed. Parties aggrieved by such error or fraud must resort to a direct proceeding to set aside the patent." Chever v. Horner, 11 Colo. 72, 17 Pac. 495, and cases cited.

It is settled doctrine, well supported by both authorities and reason, that, from the existence of the patent evidencing the grant, the presumption arises that all the acts have been performed, and all the necessary facts have been shown to exist, by the party to whom it was made, which were prerequisites to its existence, and that the proper officers have examined and adjudicated the question of the right of the applicant, and the patent, the evidence of such determination, is unassailable collaterally. The patent in this case ran to the trustees of the city of Grandview, and the deeds, purporting to convey title to the various claimants of lots and undivided interests in the stone-quarry reserve, were signed "A. B. Moore, Chairman." The recitals of these deeds, or such as we need notice, were as follows: "This indenture, made this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-nine, witnesseth: That whereas, the congress of the United States passed an act entitled 'An act for the relief of citizens of towns upon lands of the United States, under certain circumstances,' approved May 23, A. D. 1844; and whereas, the legislative assembly of the territory of **Nebraska**, under and in pursuance of said act of the said congress, passed an act entitled 'An act regulating the disposal of lands purchased in trust for town sites,' approved February 10, A. D. 1857; and whereas, the trustees of the city of Grandview have paid for and received a title from the United States, in trust for the occupants and owners of the lots and pieces of land in the city of Grandview and territory of **Nebraska**, which city is located upon [here follows a description of the land]: Now, therefore, by virtue of the power in said board of trustees vested, by the two several acts, as ***1035** such trustees aforesaid, the said trustees of the city of Grandview, in consideration of the premises and of the sum of twenty-nine (being one-tenth of the costs of entry) dollars in hand paid, the receipt whereof is hereby acknowledged, do

by these presents convey unto [here follows the name of the grantee and description of the property conveyed]. In witness whereof, I have hereunto set my hand this fifth day of March, A. D. 1859, by authority of the said board of trustees. Andrew B. Moore, Chairman."

It is argued by counsel for plaintiff in error that, inasmuch as the instruments state that they are executed under and by virtue of the provisions of the act of 1857, this must be accepted as true and binding, and, further, since the act of congress required the deeds to be executed in conformity to the rules and regulations prescribed by the legislative assembly of states and territories, and if not so executed they should be void and of none effect, and the territorial act of 1857 prescribed that the conveyances therein provided for should be made by the mayor of the town, if incorporated, and, if not incorporated, by the county commissioners, these deeds, being executed by neither, were void, unless the word "mayor," in the act, be construed as a generic term, and, as such, to include the chairman of the board of trustees of a town or city; and, if this last view be entertained, that it devolve upon the parties introducing the deeds, and whose success depended on their validity, in order to establish it, to show that the chairman of the board of trustees of the city of Grandview possessed such authority, and was empowered or required to perform acts and duties which usually appertain to the office of mayor of a city, and thus bring him within the scope of such appellation, viewed as a generic term. This argument is not tenable. It must be remembered, as we have hereinbefore stated and shown, that, by an act of the territorial legislature, passed in 1858, the act of 1857 was repealed, and those deeds were all executed subsequent to the passage of the act of 1858. At the time, then, of the making of these deeds, the law of 1857 had no further existence. The date of the entry of the land does not appear in the record. The date of the patent is April 1, 1859. So we cannot say whether the entry was made during the life of the act of 1857, or after the enactment of the law of 1858 on the subject. But, however this may have been, at the date of the conveyances in question the act of 1858 was in force, and the law of 1857 did not exist,--had been repealed; and the recital in the deed, referring to the act of 1857 as the basis or source of authority for their execution, had no other or greater force or effect than if there had been no recital, and no reference to any law as authorizing the performance of the act of making the deeds. If there had been no recital of the authority, it would not have invalidated the deeds. Burbank v. Ellis, 7 **Neb**. 156. The deeds must be viewed as executed under the authority and provisions of the act of 1858.

It is insisted that it should have been shown that the city of Grandview had been incorporated, and that the parties to whom transfers had been made were occupants of the premises or portions of the property conveyed to them; or, in other words, it was necessary that proof be made that the parties to whom the deeds were made were the proper ones, that all the acts to be performed had been done, or the facts required to exist by the statute were existent, at the time of the execution of the deeds. These were matters to be investigated and determined by the person holding the trust, and upon whom it devolved as a duty, on demand by the proper party, to make a deed,--in this case, the chairman of the board of trustees of the city,--and his settlement of the questions was not subject to collateral attack. As was said in the decision of the case of Taylor v. Railroad Co. (Minn.) **47** N. W. 453: "The execution of a deed of a part of the town site by the judge, who is trustee for that purpose, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps necessary to be taken to obtain title. The execution of a deed by the judge is in the nature of an official declaration and determination by him that all the requirements preliminary to the execution of the deed have been complied with, and that the person to whom it is issued is the person entitled to it. The doctrine of presumptions in favor of official acts obtains,--that the judge did his duty in all respects, and had required the grantee to show, by legal proofs, that he was the party entitled to a deed and that he had complied with all the necessary prerequisites to its execution. Moreover, when a trustee, in whom is vested the land constituting a town site, in trust for the occupants, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, no one who is not a beneficiary of the trust, but a mere stranger to the title, as is the defendant here, can call in question the validity or regularity of such conveyance, or, by subsequent intrusion upon the possession, acquire any right to inquire into or litigate the question whether all the steps required by law were taken, or whether the party to whom the deed was executed was the person entitled thereto. Anderson v. Bartels, 7 Colo. 256, 3 Pac. 225; Murray v. Hobson, 10 Colo. 66, 13 Pac. 921; Chever v. Horner, 11 Colo. 68, 17 Pac. 495; Mathews v. Buckingham, 22 Kan. 166; Ming v. Foote (Mont.) 23 Pac. 515; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 N. W. 355; Smelting Co. v. Kemp, 104 U. S. 640; Cofield v. McClelland, 16 Wall. 331-334." Tucker v. Railroad Co. (Wis.) 65 N. W. 515; Lamm v. Railroad Co. (Minn.) **47** N. W. 455. Nor was it necessary to prove the organization of the city in order to make the deeds properly receivable ***1036** in evidence. Mathews v. Buckingham, 22 Kan. 166.

It is contended that it was necessary for the parties depending on the deeds from the trustees of the city as evidence of title to show that A. B. Moore, who signed the conveyance, was chairman of the board of trustees, before they should have been received in evidence, or, at least, before instructing the jury that they were competent evidence, and established one link in the chain of title. This was not one of the facts the existence of which, as a prerequisite to the execution of the transfer, he determined before making the conveyances. We have herein quoted portions of one of the deeds, and it was agreed that, in such statement as we have copied, they were all similar; and it will be remembered that it was not recited in the deed that A. B. Moore was chairman of the board of trustees, and he signed it "A. B. Moore, Chairman," with no statement of what body or organization he was chairman, with no reference to the board of trustees of the city of Grandview, unless it should be said that the deed, being one which, according to its recitals, was made by such trustees, and he signing it as "chairman," it must be presumed to be as such officer of the board stated in the deed. Had the recital of the capacity in which he executed the deeds appeared therein, or after his signature, it would have proved no more, as against plaintiff in error, than that he claimed to have executed them as such officer. It would not have been proof of the fact that he was such chairman. The acknowledgment identified Moore as chairman of the board of trustees of Grandview city; but this was but for the purposes of the acknowledgment, which was no part of the deed, and was not substantive proof of the fact as an independent fact.

During the trial there was introduced in evidence, over the objection of plaintiff in error, "page 14, Book of Corporation of Grandview," which, from its statements, would seem to be the minutes of the proceeding at a meeting of the board of trustees of the city of Grandview, and that, among other things which transpired at the meeting of date August 4, 1858, A. B. Moore was appointed chairman. This was identified by but one witness, who was asked: "Q. You remember an organization known as the Grandview Company?" To which he answered: "A. Yes, sir." And his examination was continued, in part, as follows: "Q. Were you a member of it? A. I was." He was shown a book, and stated: "That is the minutes or records of the meetings and transactions of the company,--of the board of trustees." And again, in answer to a question propounded by Mr. Baldwin, counsel for plaintiff in error, he answered: "I know that it is the book of the records of the transactions of the company." And again: "Why, it is the records of the proceedings of the company,--the Grandview Company,--kept by the secretary or secretaries of that company." From which it will be gathered that the page of the book introduced in evidence was not identified as being the minutes of a meeting of the board of trustees of the city of Grandview, but of the Grandview Company, and was not competent as evidence of the proceedings of the board of trustees of the city of Grandview. This witness also testified that he was a member of the Grandview Company, and at one time its secretary,--he thought its last one; that he knew who was chairman of the board of trustees of the company; that it was A. B. Moore; and that there was never any other. Proof that A. B. Moore was chairman of the board of trustees of an organization called the "Grandview Company" had no relevancy or competency in this case. Unless he was chairman of the board of trustees of Grandview city, he had no power or authority to act and execute the deeds transferring the title, held in trust by the board, to the beneficiaries of the trust; and, without proof that he was such chairman, the deeds were not evidence of the conveyance of the title. There being no proof of the fact of his chairmanship of the board of trustees of the city of Grandview, the court erred in instructing the jury that the defendants in error had shown a complete title, as these deeds, signed by "A. B. Moore, Chairman," constituted an indispensable link in the chain of each title to be proved.

On the facts or circumstances involved in the second or affirmative defense, viz. adverse possession for a sufficient length of time to bar any action for recovery of the possession or title of the premises, we will not now comment, as there must be a new trial, and they must again be submitted to the jury or a trial judge for determination, a discussion of them at this time is unnecessary, and might be prejudicial to the rights of one or the other of the parties in another trial. The judgment of the district court is reversed, and the cause remanded. Reversed and remanded.

IRVINE, C., took no part in the decision.

**Parallel Citations**

66 N.W. 1032