

8647

No. \_\_\_\_\_

# Supreme Court of Illinois

Alfred Townsend et al

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vs.

Wm. J. Radcliff

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71641  7

State of Illinois }  
 St. Clair County } ss. It is remembered that in  
 the St. Clair County Circuit Court, within and for  
 said County, the following proceedings were had,  
 to wit:

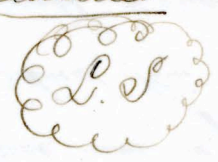
It is remembered that on the thirteenth  
 day of March A.D. 1867. the following summons  
 was filed to wit:

State of Illinois }  
 County of St. Clair } ss. The People of the State of Illinois  
 To the Sheriff of St. Clair County Greeting.

We command you to summon William  
 J. Radcliff if he can be found in your County, to  
 be and appear in the St. Clair Circuit Court, on the first  
 day of the next term thereof, to be holden at the Court  
 House in the City of Belleville, in said County, on  
 the third Monday of March instant then and there  
 in said Court in Chancery setting to answer the Bill  
 of Complaint exhibited against him by Alfred  
 Townsend, Edmund Townsend, Whiffield Town-  
 send, William Townsend, Betsey Townsend,  
 Nancy Townsend, Caroline Smith, Jacob Smith,  
 George Dugger, Elisabeth Early, Charles Early,  
 James Dugger a minor by Alfred Townsend his  
 next friend for Discovery & general Relief -  
 and not to fail under penalty of what the law direct.  
 And this writ you shall have at our said Court,  
 with your return endorsed thereon.

Witness, Henry A. Kucher, Clerk  
 of the Circuit Court, and the

2.

50 cents  
U.S. & Stamp  
cancelled  


Seal thereof hereunto affixed, at office  
this first day of March A.D. One thousand  
Eight hundred and sixty seven  
Henry A. Keicher  
CR.

Which Summons is endorsed as follows to wit:  
I hereby deputize Silas Smith Const. to serve the within  
with March 2<sup>d</sup>. 1867 Char Decker Shff  
Alfred Townsend et al  
vs  
William J. Radcliff } Returnable March term 1867.  
Iuly served by reading and  
delivering a true copy to the within named Defendant  
March 2<sup>d</sup>. 1867 Char Decker Shff  
Shff fee Ser & Ret 60  
           mileage 75  
           Copy 50  
                    185  
by J. Smith Atty by  
Norman solicitor.

It is remembered that on the first day of  
March A.D. 1867 the following Bill was filed to wit:  
State of Illinois 3<sup>d</sup> of the March term A.D. 1867  
St. Clair County 3<sup>d</sup> of the St. Clair County Circuit Court  
In Chancery.

To the Honorable Joseph Ellispie  
Judge of the St. Clair County Circuit Court.

Humblly complaining Your Orators  
Alfred Townsend, Edmund Townsend, Whitfield  
Townsend, William Townsend, Percy Townsend,

3. Nancy Townsend, Caroline Smith and her husband Jacob Smith. George Dugger. Elisabeth Early and Charles Early her husband, and James Dugger a minor by Alfred Townsend, his next friend residents of the State of Illinois respectfully shew unto your Honor that they are Children and Grand Children of one Whiffield Townsend deceased who was brother to one Edmund Townsend deceased, That the said Edmund Townsend dec<sup>d</sup> at his decease his last will and testament duly recorded & probated in said County of St. Clair in which the said Edmund Townsend devised certain real Estate to his Daughter Nancy (who was the wife of one Isaac Vandoren now deceased) to be held by her during her natural life, and at her death the said real Estate to descend to the Children or grand Children of the said Nancy, and in default of Children or grand Children then the said real Estate should descend to the heirs at law of the said Edmund Townsend deceased. That in said last will and testament the said Edmund Townsend also bequeathed to his said daughter Nancy the use of all his money or personal Effects that shall remain after first paying the debts of said deceased and a certain legacy therein mentioned, and that said money and personal property were to be held by one Alfred Townsend as Trustee for the use of said Nancy, all of which will more fully appear by reference to said last will and testament a true Copy of which is herewith filed marked Exhibit "A"

4. and prayed to be taken as part of this bill of complaint  
Your Orators further show that the said Alfred  
Townsend who was under said last will and testament  
made Trustee to hold said money and personal property  
as herein before stated took possession of the same  
and after holding the same in his hands for some years  
as a matter of convenience to himself placed said money  
amounting to about \$1200. and other personal property  
consisting of Horses, Cattle, Hogs, Farming Utensils and  
house hold & Kitchen furniture of the value of about  
\$1000. into the hands of <sup>the</sup> said Nancy Vandoren for  
her control and management. That afterwards  
to wit on the 27<sup>th</sup> day of March A.D. 1862 the said  
Nancy Vandoren married one William J. Ratcliff,  
and that the said Nancy afterwards to wit on the  
34<sup>th</sup> day March A.D. 1864 departed this life inter-  
state leaving no child or children or descendants of  
a child or children, nor father or mother nor brother  
or sister or descendants of a brother or sister.

Your Orators further show that at the time the said  
Nancy intermarried with the said William J. Ratcliff  
all the money under her control amounting to about  
\$1200. was loaned out at interest and promissory  
Notes taken payable to the said Nancy and that the  
said William J. Ratcliff never had possession  
of said money or ever in any way exercised Control  
over said money during the life time of the said Nancy.  
Your Orators further show that the said William J. Ratcliff

5.

took out letters of Administration from the Probate Court of Madison County in the State of Illinois, on the Estate of the said Nancy, and as Administrator collected in the outstanding moneys payable to the said dec'd, and that after the Expiration of two years from the time of taking out letters of Administration on the 26<sup>th</sup> day of July 1866 the said William J. Radcliff made a final settlement of said Estate before the Probate Court of said County of Madison in which final settlement the said William J. Radcliff charges himself with a balance in his hands of said Estate of \$1134.86 all of which sum the said William J. Radcliff claims as his by virtue of being the husband of said dec'd. At the final settlement of said Estate the Probate Court of said County Madison ordered the said William J. Radcliff to pay over the balance in his hands as Administrator aforesaid to the person or persons legally entitled to receive the same referring to determine who were the proper distributees thereof which will more fully appear by reference to a certified Copy of said final settlement of said Estate from the probate Court of said County of Madison marked Exhibit "D" and prayed to be taken as part of this Bill of Complaint. Your Orators further shew unto your Honor that your Orators are Cousins, and the legal representatives of cousins to the said Nancy dec'd and are the only heirs at law of the said Nancy Radcliff by virtue of the Statute laws of the State of Illinois.

6.

Your Orators further show that the said William J. Radcliff only administered on the money loaned at the time of his marriage with the said deceased, and which money was never in his possession, that the said deceased was the owner of divers kinds of personal property at the time of her said marriage with the said Radcliff, and divers kinds of personal property purchased with her money after she married the said Radcliff, all of which his said wife always claimed and held as her separate property in her life time & the said William J. Radcliff never inventoried, or caused to be appraised or in any way administered on but claims said property as his own by virtue of being the husband of said deceased. Your Orators further show that the various kinds of personal property held, possessed & owned by said deceased at the time of her marriage with the said Radcliff and acquired with her money during her marriage with the said Radcliff are now unknown to your Orators, and can only be proved & discovered by the said depts, and by no other witness.

In consideration of the premises your Orators pray that the said William J. Radcliff may be summoned, and made defendant to this Bill of Complaint, and that he may be compelled to discover under oath, and give a full and complete inventory of all the personal property owned by the said Nancy Radcliff died at the time of her marriage with him, and all the personal property acquired after marriage with

J. the said Radcliff with her money not inventoried or appraised by said Administrator & held as her separate property by her in her life time, and that the said William J. Radcliff be be compelled to account to your Orators for all the personal property of every description that came into his possession at the time of his marriage with the said deceased, and all the personal property acquired with her money after and during her marriage with the said Radcliff & held by her separate from his property and all the money administered on by the said William J. Radcliff as Administrator of said deceased, Your Orators further pray that the Honorable Court will determine and adjudge who is the rightful owner of the effects of the said Nancy Radcliff deceased after paying her debts and make such Order and decree touching the distribution of the same, and that your Orators may have such other and further relief as justice and Equity may require as our Orators are in duty bound will ever pray

Underwood & Horner  
Sols for Complainants



It is remembered that on the first day of March A.D. 1867 the following Exhibits were filed to wit:

Exhibit A.

I Edmond Townsend of St. Clair County and State of Illinois, do make and publish this my last will and Testament in manner and form following that is to say:

First, it is my Funeral Expenses and all my just debts be paid.

Second. I give, devise and bequeath, to my beloved daughter Nancy, wife of Isaac Van Curen the following described tracts of land situated in St. Clair County Illinois, viz: Sixty acres, off the North end of the North West quarter of Section six, Township two north, Range six West. Also Thirty acres more or less being part of the North East quarter of Section six Township two north Range six west, bounded as follows, beginning at a stake in the West boundary of said gr. sec. about forty poles from the N.W. corner, thence east with the South line of a lot of land sold by me to John Hays, 160 poles to the east boundary of said gr. sec. and to the South East corner of the said Hays land, thence South about 30 poles, to the corner where my land adjoins the lands belonging to the heirs of Whitfield Townsend deceased, thence West to the west boundary of said quarter section, thence North to the place of beginning, said described lands to be held by her my said daughter Nancy, during her natural life; together with all the rents profits and benefits arising

9. Therefore, to her own proper use and benefit, and at her death it is my will and desire that the said described lands shall descend at once to her Children, or grand Children should any survive her, and in default of Children or Grandchildren to her, it is my will and desire, that the said property descend to my heirs.

Third It is my will and desire that my said daughter Nancy, shall have and enjoy all moneys or personal Effects that may belong to my Estate after the payment of the debts that may be due by said Estate, and the payment of a legacy hereinafter to be made, and I hereby nominate Alfred Townsend as trustee, into whose hands said effects or money shall be placed, for the use and benefit of my said daughter.

Fourth. I give and bequeath unto my beloved daughter in law Nancy Townsend about Eighteen acres of land lying in the South East corner of the South West quarter of Section Thirty one, Township Three North Range six West, in Madison County Illinois, being the balance I now own, of a quarter Section of land conveyed to me by John Edgar and wife by deed dated 22<sup>d</sup> Nov 1827.

Fifth. I give and bequeath unto my beloved son in law, Leas Van Goren, Two hundred Dollars.

Sixth: I hereby nominate Alfred Townsend my Executor and charge him with the duty of carrying this my last will into effect.

In testimony whereof, I have hereunto set my hand and seal this fourteenth day of June A.D. Eighteen hundred and forty Nine

Signed, published and  Edward Townsend <sup>his</sup> Townsend   
mark

declared by the above named  
Edmond Townsend as

and for his last will and Testa-  
ment in presence of us who at his  
request have signed as Witnesses to  
the same in his presence and in  
presence of each other

W. W. Roman

A. N. Ashley

J. A. Roman

State of Illinois

St. Clair County }  
}

I, Penland Wick Clerk of the  
County Court within & for said County & State, do  
herby certify the foregoing to be a true Copy of the  
last Will & Testament of Edmond Townsend, dec.  
as the same appears on file & Record of Wills  
Book D page 70 to 72. in my Office & was  
probated March 21. 1850.

5 cents U.S.R. Stamp  
Cancelled



Witness my hand and the seal of  
said Court at office in Jellville  
this 7th day of May A.D. 1854

P. Wick Collins

Exhibit "I"

William J. Radcliff Administrator in account with Estate of Nancy Radcliff dec'd

Said accountant charges himself with the amount as shown by Inventory with Interest \$1,324.00

Said accountant Credits himself

By amount paid Court Fees	9.70
" " " for Coffin	40.00
" " " Physician	20.00
" " " Grave Stones	40.00
Administrators Commissions	79.14
	<u>189.14</u>

Leaving in Administrators hands the sum of \$1134.86.  
July 26, 1866.

And after deducting the sum of \$11.34 due for United States Stamps Succession Tax is to be paid out and distributed to the person or persons legally entitled to receive the same. The said William J. Radcliff claiming that he is Entitled to retain and keep the said balance as husband of the said deceased, she having died without leaving a child or children or descendants of a child or children, and leaving said Administrator as her husband

July 26, 1866

William J. Radcliff  
adm<sup>r</sup>

Recorded July 26, 1866.

State of Illinois }  
 Madison County } J. Charles W. Dimmock  
 Clerk of the County Court of the County of Madison  
 State of Illinois hereby Certify that the foregoing is a true  
 Copy of the account of William D. Radcliff as Admi-  
 nistrator of the Estate of Nancy Radcliff deceased  
 filed in our County Court on the 26<sup>th</sup> day of July  
 A.D. 1866 and approved by the Judge of said Court  
 and Entered of Record in Book 3. Page 169



U.S.R.St  
 5 cents  
 cancelled

Witness, Charles W. Dimmock  
 Clerk of said County Court and the  
 Seal thereof at Edwardsville this 1<sup>st</sup> day  
 of November A.D. 1866  
 Charles W. Dimmock, Clerk

It is remembered that on the twenty sixth day of  
 March A.D. 1867 the following demurrer was filed to wit:  
 Alfred Townsend et al

vs } Bill for Discovery & Relief  
 William D. Radcliff }

And the said William  
 J. Radcliff for answer to said Bill doth  
 demur thereto and for cause of demurrer says  
 1<sup>st</sup> That the Compts should have applied to the  
 County Court of Madison County Illinois for an  
 order for said Def. to pay over balance in <sup>his</sup> hands  
 as Adm. of said Nancy Radcliff to said  
 Compts. and upon a failure <sup>of said</sup> Court to grant such

13.

Order, to have appealed therefrom.

2<sup>d</sup> The bill does not show that the said W. J. Stadeliff is a Resident of St. Clair County.

3<sup>d</sup> The said W. J. Stadeliff being by law entitled to his wife's personal property at the time of her death, the said Compts are not in law entitled to any Discovery or Relief, and have no cause of action.

A. W. Miscoy & C. W. Thomas  
Sols for Def.

It is remembered that on the first day of April the following demurrer to amended bill was filed to wit:

Alfred Townsend et al }  
vs } Bill for Discovery & Relief  
William J. Stadeliff }

And the said William J. Stadeliff for answer to said bill as amended doth demur thereto and for cause of demurrer says

1<sup>st</sup> That the Compts should have appealed from the decision of the County Court of Madison County referred to in said amended bill, having by means of such an appeal a remedy at law.

2<sup>d</sup> The said Def. being by law entitled to the personal property of his said wife Nancy at the time of her death, the said Compts. are entitled to have no Discovery in regard thereto, and no share thereof, and have no cause of action. A. W. Miscoy & C. W. Thomas Sols for Def.

Joinders in demurrer Underwood & Nickling Sols for compts.

At a regular Term of the Circuit Court within and for the County of St. Clair and State of Illinois, begun and held at the Court House in the City of Jellenville on Monday the Eighteenth day of March in the year of our Lord One thousand Eight hundred and sixty seven, it being the third Monday of March in the year of our Lord One thousand Eight hundred and sixty seven, according to the Act of the General Assembly, by the Honorable Joseph Gillespie Judge of the twenty fourth judicial Circuit of the State of Illinois, of which the said County of St. Clair forms a part the following proceedings were had to wit:

Alfred Townsend et al  
 vs  
 William J. Radcliff } Discovery Relief

On the first Tuesday came the bill by Underwood & Neotling and H. H. Horner their Attys and on their motion the Court grants a rule on the Deft. to answer by the second Saturday, and now on the second Friday comes the Deft. by Mcleaff & Thomas his Attys and demurs to the bill which demurrer is sustained by the Court and leave granted to amend the bill. On the third Tuesday the Deft. by his said Attys again demurs to said amended bill and the Court sustains said demurrer and orders the bill to be dismissed

15. at the plaintiffs costs. And now comes William Townsend on of the plaintiffs by his Atty. and prays for an Appeal to the Supreme Court which is allowed by the Court upon his filing a bond in the penal sum of \$500 conditioned according to law, within thirty days and the Clerk to approve the security.

It is remembered that on the fifth day of April A.D. 1867 the following Appeal bond was filed, to wit:

Know all men by these presents that we William Townsend and Whitfield Town, said are held and firmly bound unto William S. Radcliff in the penal sum five hundred dollars for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and Administrators jointly, severally, and firmly by these presents. Witness our hands and seals this 4<sup>th</sup> day of April A.D. 1867.

The condition of the above obligation is such, that whereas the said William Townsend and others did on the first of March 1867 file their bill in Chancery in the St. Clair County Illinois Circuit Court against said Radcliff for discovery and general Relief and which said bill was on the third Tuesday of the March Term of said Court to wit, on the 2<sup>nd</sup> day of April 1867 dismissed and from which order and decree



16. of dismissal the said ~~William~~ Townsend has  
prayed for and obtained an appeal to the  
Supreme Court of said State. Now if the said  
William Townsend shall duly prosecute his  
said Appeal with effect, and shall moreover  
pay the costs interest and damages rendered  
and to be rendered against him in case the said  
order and decree shall be affirmed in the said su-  
preme Court, then the above obligation to be void,  
otherwise to remain in full force and virtue.

Approved April 5<sup>th</sup>

A. D. 1867.

Henry A. Kircher

by Geo. E. Schell Secy

William Townsend

Whitfield Townsend

H. A. Horner

State of Illinois

St. Clair County

I, Henry A. Kircher Clerk of the Circuit Court  
in and for said County of St. Clair and State of Illinois, do hereby  
certify the foregoing to be a true copy of the Summons, Bill,  
Exhibits marked "A" & "B", Defendants Demurrer to Bill & amen-  
ded Bill, Order & Decree of the Court and the appeal Bond in  
the case wherein Alfred Townsend et al are Plaintiffs &  
William J. Radcliff is Defendant, as the same appear  
on file and of record respectively, in my office.

In testimony whereof I herewith set my hand  
and the seal of said Court at Office in Belle-  
ville Illinois this 18<sup>th</sup> day of April A. D. 1867.

Henry A. Kircher  
HAK

Alfred Townsend,  
Edmund Townsend,  
Whitfield Townsend,  
William Townsend,  
Betsey Townsend,

Nancy Townsend  
Jacob Smith &  
Caroline his wife,

George Dugger,  
Charles Early &  
Elizabeth his wife &

James Early a minor by  
Alfred Townsend his next friend

vs.  
William J. Raddiffe

And now comes the appellant and says  
in the record & proceedings aforesaid there  
is manifest error in this to wit: 1st The  
court below erred in dismissing said bill,  
2 The court below erred in sustaining the  
demurrer to said amended bill, 3 The  
court below erred in not ordering and de-  
creeing as prayed for in said bill; where-  
fore appellant prays that said decree  
below may be reversed &c.

Wm B Underwood  
Sol. for appellant

For the Defendant  
Charles W. Thomas

Sol. for appellant

Bill for  
Discovery &  
Relief -

Appeal from  
H Blair.

41  
Alfred Townsend et al

Wm G. Radcliff.

Copy of.

Record \$7.  $\frac{50}{100}$

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Clerk of Supreme  
Court will please  
file this record &  
Wm G. Radcliff  
Sol. for com. pt.

~~paid by test 5.00~~  
filed June 4-1867.  
N. Johnston Clk  
paid by us - \$5.00

\$7  $\frac{50}{100}$  paid by W. Townsend

Bruce

~~Case~~ Ch. J. This was a bill in chancery in the  
 McLean circuit court brought by Alfred Townsend and  
 others claiming to be the legal representatives of Nancy  
 Radcliff deceased against her surviving husband  
 William S. Radcliff for a recovery of all the  
 personal property belonging to deceased as her  
 separate property at the time of her death, and to  
 decree the same to complainants as the heirs ~~and~~ at  
 law and distributors of deceased. The bill also  
 prayed that defendant, who had administered upon  
 the estate of the deceased, should account to them  
 for all moneys he had received belonging to her as  
 administrator, and that the Court ~~will~~ <sup>would</sup> adjudge  
 who is the rightful owner of her effects after paying  
 her debts and make an order for the distribution  
 of the same. The defendant as administrator had

~~He refused to account for the same~~  
 On the 17th of July, 1871, made a final settlement of  
 the estate before the ~~Probate~~ <sup>County</sup> Court after the expira-  
 tion of two years from the time of ~~he~~ taking out  
 letters of administration, and had charged him-  
 self with a balance in his hands of eleven hundred  
 and thirty four dollars and eighty six cents, all of  
 which he claimed to be his, as husband of the  
 deceased.

The ~~probate~~ <sup>County</sup> Court ordered the administrator to pay  
 over this balance to the persons legally entitled  
 to receive it, ~~without~~ <sup>without</sup> determining who were  
 the proper distributees thereof.

A demurrer was filed to the bill on the grounds, first, that complainants had a remedy at law by taking an appeal from the order of the County Probate Court, and second, that defendant was entitled to all of the personal property of the decedent.

The court sustained the demurrer and dismissed the bill, to which, the record is brought here by appeal and the decision of the Court is ~~in~~ upon the demurrer is the *enon opus* quad.

It is admitted the marriage of the deceased intestate, was ~~after~~ subsequent to the passage of the act of 1861, to protect married women in their separate property and that the property had been devised to her by her father under his last will.

The defendant, appellee here, contends that by the *jure mariti*, or as administrator of his wife, he is entitled to all the property and money in his hands; and that the remedy of complainants was at law, by appeal from the order of the County Court.

In support of this proposition reference is made to Section 90 Ch. 110 title "Wills". That Section we do not think, has any application. The object of that Section is to get at property which may be concealed or subverted, or be in the possession of a party not entitled to it, in order that it may

be deemed up to be administered upon.

Hall  
We do not perceive how the complainants could have appealed or from what they should have appealed, as the County Court failed to determine who was entitled to the surplus of the wife's estate. The order so far as it went was well enough that the <sup>administrator</sup> should pay it to the persons legally entitled to receive it, and this bill <sup>was</sup> filed for the purpose of ascertaining that fact. We know no tribunal more competent to settle such a question than a Court of Equity which has a paramount jurisdiction in cases of administration and the settlement of estates, and may control Courts of Law in their action in their settlement and distribution. Grattan vs Grattan 18 M. 171.

The other and most important question, must be determined by reference to our statute. ~~Commissary vs. Grattan~~  
~~Commissary vs. Grattan~~

Our statute of Wills, by Section 46 declares "after all debts and claims against an estate shall be paid, the remainder of the estate shall descend to and be distributed to the children of the intestate and their descendants in equal parts; if there be no children or descendants of the intestate or descendants of such children, and no parents, brothers or sisters or descendants of brothers and sisters, and the widow,

then such estate shall descend in equal parts to the next of kin to the intestate in equal degree computing by the rules of the civil law. *Scott's Comp.* 1199.

By Section 55, administration on the estate of the wife is the right of the husband.

The property of the intestate consisted for the most part, in promissory notes on different persons made payable to her, <sup>while she,</sup> which never came into the possession of her husband or <sup>had he</sup> any control over them in her life time. He had <sup>not</sup> reduced them into his own possession.

On this point, the law is well settled, ~~that~~ <sup>that</sup> ~~the~~ <sup>the</sup> ~~husband's~~ <sup>husband's</sup> ~~intervention~~ <sup>intervention</sup> ~~was~~ <sup>was</sup> ~~not~~ <sup>not</sup> ~~required~~ <sup>required</sup> by the law in the wife's time of her life, nor to be taken on her death, <sup>but to be</sup> ~~but to be~~ ~~made~~ <sup>made</sup> ~~by~~ <sup>by</sup> ~~her~~ <sup>her</sup> ~~husband~~ <sup>husband</sup> ~~or~~ <sup>or</sup> ~~any~~ <sup>any</sup> ~~other~~ <sup>other</sup> ~~person~~ <sup>person</sup>. What marriage <sup>was</sup> prior to the act of 1861, <sup>is</sup> considered as an absolute gift to the husband of the goods, personal chattels and estate of which the wife was actually and beneficially possessed at the time of marriage in her own right and of such other goods and chattels as came to her during the marriage, with regard to process in action, the marriage was only a qualified gift, upon the condition that he <sup>should</sup> reduce them into possession during the continuance of the marriage. Failing to do this, on the death of the wife they devolved to her next of kin.

The act of 1861, continued the separate property of the wife in her own right, and

placed it beyond the control of her husband. ~~but~~ The  
appelle contends that by the terms of the act, <sup>her property</sup> ~~it~~ was  
to placed only "during Coverture", and that at her  
death, it passes to the husband in that right, or to him  
as administrator or becoming such.

This is not a proper inference from the language of  
the act taken in connection with the sections of the  
Statute of Wills above cited. The property <sup>being</sup> ~~is~~ the abso-  
lute property of the wife "during Coverture", it would  
seem to follow, on her death it would to her next of kin,  
or to her devisees, as she might nominate by her last  
will. It is her absolutely, and dying intestate, it becomes  
subject to the provisions of our Statute in relation to inter-  
state estates. The cases cited by appellee, are based  
upon the Statute of 29 Car. 2 which never was in force  
in this State as it was passed subsequent to the fourth  
year of the reign of James 1<sup>st</sup>. The rule as contended  
for by appellee is the law in England, <sup>and</sup> New York, Kentucky  
~~and~~ as appears from the authorities cited. Stewart  
vs Stewart 7 Johns. Ch. 229 - 2 Wrights Rep. & wife  
224. Prosser et al. vs Alden et al. 14 B. Prosser  
143. and perhaps in other States.

In those States having Statutes of intestation  
like our own, the <sup>husband's</sup> ~~husband's~~ property of the wife  
on intestacy, has always been held to go to her  
next of kin, and not to her husband in either  
right as claimed. Holmes vs Holmes 28 Ver.  
765. Curry & Falkington 14 Ohio 108. Dixon vs  
Dixon 18 ib. 113. Baldwin vs Carter 17 Conn. 201 \*

Kennedy

her life time, descends upon her death to her heirs or representatives and not to her husband.

Coz vs Morrow 14 Ark. 617, Cator vs Cartledge  
18 ib. 155. It was held that the personal property  
of the wife not devised to her by the husband during  
her life time, descends upon her death to her heirs or representatives and not to her husband.



70

This was the rule of the Common Law though the administrators could not be compelled to make distribution, until the act of 22 Car. 2 was passed compelling them, and under that act, the distribution was to the best of sense of the wife. *Rees v. Dow. Rel. 15*

Before this statute, all the children of a deceased person were equally entitled to their several shares of the personal estate of their father, yet if one of them procured administration <sup>on</sup> the estate, he would take the whole to himself, as did the clergy when to their care estates were committed. In the same manner when the wife died, the husband was considered as having a large right to the administration of her estate, and having obtained the appointment, he could not be compelled to distribute to her representatives. But this statute made it the duty of all administrators to distribute the estates of deceased persons, &c. By the statute 29 Car. 2, husbands were permitted after having paid the debts due from their wives to hold conclusively all their wives' choses in action without any liability to account for them to any person - This altered the common law giving that to the husband which before belonged to the representatives of the wife.

This statute was never in force in this state, and consequently, the husband here is in no different situation from other adminis-

trustees and must distribute the estate according to our statute of distribution. The husband becomes administrator by virtue of our statute, and is in no different condition than any other administrator, and must distribute the surplus according to the law under which he acts. He cannot claim to be next of kin to his wife, for in no sense is he such, nor is the wife next of kin to the husband. Walt v. Walt 3 Vesey Jr. 247. Garrick v. Lord Carnden 14 ib. 386 (dis. paging) Bailey v. Wright 18 ib. 49. 2 Kent's Com. 136. (5th. Ed.)

An inference may be drawn, that it was not the intention of the legislature to vest the husband with the personal estate of his wife after she deceases from Section 47 Ch. Mills, wherein it is provided the husband shall have one half of the real estate of the wife forever if she dies without issue.

We are of opinion the next of kin of the intestate, is entitled to the surplus of her estate and the decree to the vice versa have been reversed, and a discovery compelled.

The judgment of the Circuit Court is affirmed and the cause remanded.

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June 5, 1867

Townsend  
or  
Radcliff  
Opinion by  
Preece & f

C.K.

F. R. 4, 95

B. 45

# Illinois Supreme Court, --- First Grand Division.

ALFRED TOWNSEND, et. al.,  
 vs.  
 WILLIAM J. RADCLIFF. } Appeal from St. Clair.

Page 3 This was a bill in chancery filed by complainant against deft. in St. Clair circuit court for Dis-  
 covery and Relief. The amended bill states that Edward Townsend, deceased, left a last will, duly  
 recorded and probated in said county, by which among other things he bequeathed to his daughter  
 Nancy the use of all his money and personal effects that remain after paying all his debts &c.; and  
 the said money and personal property were to be held by one Alfred Townsend as trustee for the  
 " 4 use of said Nancy. That said trustee took possession of the same, and after holding the same in  
 his hands for some years, as a matter of convenience to himself, placed said money amounting to  
 about \$1200, and other personal property consisting of horses, cattle, hogs, farming utensils, and  
 household and kitchen furniture to the value of about \$1000, into the hands of said Nancy for her  
 control and management. That afterwards on the 27th of March, 1862, the said Nancy married said  
 deft., and afterwards on the 24th of March, 1864, said Nancy died, leaving no descendent; nor father  
 nor mother, nor brother, or descendent of a brother or sister. That at the time of her said marriage  
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 session of said money or any control of it in her life time. That deft. took out letters of adminis-  
 " 5 tration on her estate in Madison county, Illinois, and as Administrator collected in the outstanding  
 money payable to said deceased, and after the expiration of two years from the time of taking out  
 letters of administration, on the 26th of July, 1866, made his final settlement of her estate before the  
 Probate court of said county of Madison, in which he charges himself with a balance in his hands of  
 \$1134,86, all of which he claims to be his as husband of said deceased. That at said final settlement  
 the said Probate court ordered said deft. to pay over the balance in his hands as Admr. as aforesaid,  
 to the person or persons *legally entitled* to receive the same; refusing to determine who were the  
 proper distributees thereof. That complainants are the cousins and legal representatives of cousins  
 to said Nancy, deceased, and her only heirs at law by virtue of the statute laws of this State. That  
 6 " said deceased was the owner of divers kinds of personal property purchased with her money after  
 she married deft., all which she always claimed and held as her separate property in her life time,  
 and said deft. as administrator never inventoried or caused to be appraised or in any way adminis-  
 tered upon the same; but claims said property as his own as husband. Bill alleges that the various  
 kinds of personal property, held, possessed and owned by her at her marriage and acquired by her  
 during her marriage with her money are unknown to complainants, and can only be discovered and  
 proved by deft. and by no other witness. Bill prays for an answer under oath, and that deft. may  
 be compelled to discover and make a complete inventory of all the personal property owned by said  
 7 " Nancy at said marriage and all the personal property acquired after marriage with her money, not  
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 paying her debts and make order touching the distribution of the same; and for general relief.  
 " 13 Radcliff, deft., demurred to said amended bill, 1st, Because complainants should have appealed  
 from the decision of the county court of Madison county, having thereby a remedy at law. 2d, Deft.  
 was entitled to all of said personal property of his wife, said Nancy.  
 " 14 On the 2d of April, 1867, said demurrer to said amended bill was sustained by court and said bill  
 dismissed at complainants costs. Appeal by Wm. Townsend from said decree to Supreme court al-  
 " 15 lowed upon his filing bond in \$500 in thirty days. Appeal bond filed accordingly.  
 Appellants assign for error; Court below erred, 1st, In dismissing said bill. 2d, In sustaining  
 demurrer to amended bill. 3d, In not decreeing as prayed for in said bill.

## BRIEF.

The marriage in this case was after the statute of 1861, which allows married women to "hold and own" real and personal property and sue in their own names for its recovery. *Emerson vs. Clayton* 32 Ill. R. 495. Besides in this case under the will the wife's property was to be held by a trustee for her separate use; and the husband so treated it by administering upon it as her separate property, and by settling up her estate.

2. Married women under Sec. 1 of our statute of wills, have power to dispose of their separate estate real or personal by will.

Estates not bequeathed are to be distributed as intestate estates. Sec. 42.

Husband and wife have the preference to administer upon the estates of each other. Sec. 55.

After seventy-five days any one may be appointed Admr. on the estate of the wife. Sec. 64.

Our statute of descents, Sec. 46, 47, provides for all cases of intestacy of males or females. Sec. 47 gives the husband one-half of the wife's real estate forever, where there is no descendent of the wife.

Sec 46 in such cases gives her real estate to her children or descendents if she has any. 2d, "Where there is no widow or descendent then (under Sec. 47 and 46) one-half of the real estate and the whole of her personal estate to the parents, brothers and sisters of the deceased person, and their descendents in equal parts among them, allowing to each of the parents if living a child's part, or to the survivors of them if they be dead a double portion; and if there is no parent living then to the brothers and sisters of the intestate and their descendents. 3d If no parent, brother or sister, or descendents of brother or sister then one-half of her real estate and all of her personal estate goes to her next of kin as per the civil law.

These sections refer expressly to estates of males and females and if they did not would be so constructed. 2 Purp. Stat. 1024 Sec. 28.

As to the wife's separate estate the statute of Vermont is like ours and has been construed in favor of the wife's next of kin. Holmes vs. Holmes 28 Vermont R. 765. So in Ohio and Connecticut. Curry vs. Fulkington 14 Ohio R. 106, Dixon vs. Dixon 18 Id. 113. Baldwin vs. Carter 17 Conn. R. 201

By the common law the next of kin of wife were intitled to her personal estate. Reeves Dom. R 12, 14, 15, 16, 17.

Administrators could not be compelled to make distribution until the statute of 22 Car 2d 4 Bacon's Abr. 66, 92. Reeves Dom. R. 15, 16, 2 Kent's Com. 409.

Under this statute the wife's next of kin were entitled to distribution. Reeves Dom. R. 16.

The statute of 29th Car 2d however (which never was law in Illinois 2 Purp. R. S. 707) gives the surplus of her estate to the husband. 4 Bacon's Abr. 94 Reeves Dom. R. 13, 17.

The New York statute is copied from 29 Car 2d Whitaker vs. Whitaker 6 John R. 117. So in all the states where the law is expounded in that way. 2 Kent's Com. 135, 136.

2d, The county court refused to determine who was entitled to the surplus of the wife's estate, hence there was no order to appeal from.

Courts of Equity have a paramount jurisdiction in cases of administration and the settlement of estates. Grattan vs. Grattan 18 Ill. R. 167. It is founded on its duty to enforce the execution of trusts. 1 Story's Eq. J. Secs 532, 533, School Trustees vs. Kiron 25 Ill. R. 73. Also upon the necessity of taking accounts and compelling a discovery, 1 Story's Eq. J. Sec. 534, 536, 538, 542, 543, 578, 2 Redf. on wills 188 Sec. 13.

Wm. H. UNDERWOOD, Sol. for appellant

Lounsend et al

vs

Radcliff

Abstract & Brief

Filed June 4<sup>th</sup> 1864  
Woods Johnson Clk

# Illinois Supreme Court, --- First Grand Division.

ALFRED TOWNSEND et. al. }  
vs. } Appeal from St. Clair.  
WILLIAM J. RADCLIFF. }

## DEFENDANT'S BRIEF.

1st. The appellants had a remedy at law as to the property not inventoried. 2 Purp. Stat., 1210, Sec. 90.  
2nd The husband in this state is entitled to the personal property, and choses in action of deceased wife, because

a At the common law in force in Illinois (2 Purp. Stat. 707) if there are no words excluding the husband he takes the wife's separate personalty or choses in action jure mariti, or as administrator, upon her dying intestate. Williams Pers. Prop., 302. Bright's Hus. and Wife, 224. Brown etc. vs. Alden etc., 14 B. Monroe, 143.

b. The Statute of 1861 contains no words excluding him, but on the contrary expressly provides that the wife's property shall remain her sole and separate property only "during coverture." Pub. Laws 1861, p. 143.

c. Although the wife may have power to dispose of her personal property and choses in action during her coverture; yet, if she fails to do so, and the instrument or law vesting the property in her, contains a limitation of her power over it to the time she remains a femme covert, her husband takes it upon her dying intestate. 7 Johns. Chy. R. 229 et. seq. 248. Williams Pers. Prop. 302. Bright's Hus. and Wife, 224.

3l. In the States of Vermont, Ohio, and Connecticut the Statutes which relate to the separate personal property of married women, contain no words which limit their control over it to the time of their coverture. Revised Stat. Ohio, 1860, 693<sup>b</sup>

" " Conn., 1849, p. 274.

Vermont Stat. 1850, Chap. 78, Secs. 1, 2, and 3.

Nor do the Statutes of Massachusetts or Michigan contain any such words. Gen. Stat. Mass. 1860, p. 537. Compiled Laws Mich. 1857, 965, 966.

4. In the case of Baldwin vs. Carter, 17 Conn. 201, cited by appellants, the words "during coverture" do not occur to limit the ante-nuptial agreement that the wife should hold her personal property "to her sole and separate use."

5th. The Statute of 1861 only changes the common-law where it expresses or clearly implies such a change. Swift et al vs. Castle, 23 Ill., 209, and numerous cases there cited. Commonwealth vs. Williams, 7 Gray, 337. Sedg. on Stat. and Const. Law, 315.

CHARLES W. THOMAS, Sol. for Appellee.

12 Pick. 172-3

Commonwealth vs. Walsh

Townsend  
vs  
Radcliff

Defendants Brief

3-571-2011-11

Filed June 4<sup>th</sup> 1867  
Noah Johnson Clk

DEBENBY SALLS BILLY

1867  
JAMES H. HALL

MISSISSIPPI RAILROAD... JAMES H. HALL



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WM. H. UNDERWOOD, Sol. for appellants

Lownsend et al

vs

Radcliff.

Abstract & Brief

Filed June 4<sup>th</sup> 1867

Noah Johnson Clk

including a schedule of goods, p. 1, sec. 207, and also the bill of sale, p. 123, sec. 18.  
of a good and lawful title, p. 123, sec. 18. It is hereby on its face to appear the validity of title, 1, sec. 207.  
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  - c. Although the wife may have power to dispose of her personal property and choses in action during her coverture; yet, if she fails to do so, and the instrument or law vesting the property in her, contains a limitation of her power over it to the time she remains a femme covert, her husband takes it upon her dying intestate. 7 Johns. Chy. R. 229 et. seq. 248. Williams Pers. Prop. 302. Bright's Hus. and Wife, 224.
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CHARLES W. THOMAS, Sol. for Appellee.



41.

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Alfred Townsend et al

vs

Wm J. Radcliff

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1867  
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bill on Page 112