No. 8670

Supreme Court of Illinois

Mary Redfern

vs.

Richard Redfern

71641 7

Pleas and proceedings had before the Honorable Silas L. Bryan in the Circuit Court of Marion County Illinois in cause heretofore pending in said Court wherein Mary Redfern was Complainant and Richard Redfern Defendant

Be it remembered that on the 23d day of February AD 1865 the above named complainant filed in the Office of the Clerk of the Circuit of said Marion County his Declaration in Ejectment with notice in words and figures as follows to wit

State of Illinois } of the March Term of the Marion County
Marion County } Circuit Court A D 1865

Mary Redfern
vs } Ejectment
Richard Redfern

Richard Redfern the Defendant in this suit was summoned to answer Mary Redfern the plaintiff in this suit of a plea of Trespass and Ejectment and thereupon the said plaintiff by O'Melveny and Merritt her attys complains for that whereas heretofore, to wit, on the 1st day of January 1862 the said plaintiff was possessed of and was the owner in fee simple of Lots No three and four in Block No Two in McElwain and Nichols addition

to the Town of Salem in Marion County in the State of Illinois and of the appurtenances thereunto belonging and the said plaintiff being the owner and possessed thereof as aforesaid the said Richard Redfern afterwards to wit, on the 1st day of January 1863 at the County aforesaid with force and arms entered into the said land, premises and appurtenances of which the said plaintiff was so the owner and possessed as aforesaid and Ejected the said plaintiff out of said land to wit the Lots aforesaid & unlawfully withholds the possession thereof from said plf and other wrongs to the said plaintiff then and there did to the said plaintiff, and against the peace and dignity of the people of the State, and to the damage of the said plaintiff of one thousand Dollars and therefore she brings her suit &c

A K S O Melvery
T C Merritt Attys for plf

Richard Redfern Deft

You are hereby notified that the above declaration a copy of which is herewith delivered to you will be filed in the Circuit Court of Marion County on the second day of the March term thereof

AD 1864. That upon filing said declaration a rule will be entered against you requiring you to plead to said declaration within twenty days and if you neglect so to appear and plead to said declaration within twenty days from the entry of such rule against you the plaintiff will recover the possession of the premises described therein

Dated this 21st day of February AD 1864

A R & O Melvin
T E Merritt
Attys for Plff

And afterwards to wit on the 24th day of March AD 1864 the Defendant comes and files his Affidavit to rule the plaintiff to security for costs which is in the words and figures following to wit:

Circuit Court of Morrow County Illy March Term AD 1864

Mary Redfern
vs
Richard Redfern

Ejectment

Richard Redfern

the defendant in the above entitled cause being first duly sworn according to law doth depose and say that Mary

Redfern the plaintiff in this suit has no property subject to execution out of which the costs in this suit could be made if the same should be adjudged against her; and the the officers of this Court and affiant would be in danger of losing their costs if the same will be awarded or adjudged against said plaintiff unless she will be required to give security for costs Therefore affiant prays for a rule requiring her the said plaintiff to give security for costs—

And further affiant saith not

Sworn to and signd
before me this 22d day
of March 1864

Richard his X mark Redfern

J D Chance clerk.

Whereupon the following order appears of Record in said cause which is in words and figures following

Mary Redfern
vs
Richard Redfern
Ejectment

And now at this day Thursday March 24th 1864 this cause is called and Deft is ruled to plead in twenty days. And the Deft filed affd and moves

thereon that plaintiff be ruled to give security for costs &c Cause continued.

And afterwards to wit on the 28th day of March AD 1864 the Defendant filed his plea in the words and figures following to wit

Circuit Court of Marion County March term AD 1864

Mary Redfern
vs
Richard Redfern
Ejectment

And the said defendant by M. Schaeffer his Atty comes and defends the wrong and injury when &c and says that he is not guilty of unlawfully withholding the said premises claimed by said plaintiff, in manner and form as alleged in said declaration, and of this he puts himself upon the Country &c

M Schaeffer Atty for Deft

And Afterwards, to wit, at the August Term AD 1864 on the 15th day of August AD 1865 the plaintiff files her Bond for costs which is in the words and

figures following to wit

State of Illinois } In the Circuit Court of Marion
Marion County } County to the August term
1864

Mary Redfern
vs } Action of Ejectment
Richard Redfern

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the officers of this Court, in pursuance of the laws of this State

Dated this 15th day of August A.D. 1864 } Thomas E. Merritt (Seal)

Whereupon the following order appears of Record in said cause which is in the words and figures following, to wit.

Mary Redfern
vs } Ejectment
Richard Redfern

And now at this day Tuesday Augt 16, 1864 this cause is called for trial and on consent of the parties is tried by

the Court without a Jury the Court hears the evidence &c and gives Judgment for Deft the plaintiff moves for a new trial and motion allowed under the Statute on payment of costs.

And afterwards to wit on the 3d day of February AD 1865 the said plaintiff files notice to amend and correct the judgement which is in words and figures following to wit.

Mary Redfern vs Richard Redfern } In the Marion Co Circuit Court March term AD 1865 Ejectment

Richard Redfern x
McSchaffer Atty
for Deft

You will please take notice that at the March term of the Marion County Circuit Court AD 1865 in the above entitled cause we will file a motion to amend and correct the judgment of said Court entered therein at the August term of said Court in the year 1864 When & where you may attend if you think proper
Feby 3d 1865

Melvery & Merritt
Attys for Plf

Whereupon the following order appears of Record in said cause which is in the words and figures following, to wit,

Mary Redfern
vs
Richard Redfern } Ejectment

And now at this day - to wit, Monday March 20th 1865 come the parties hereto by their Attorneys, and the plaintiff by her Attorneys ~~now~~ move the Court on notice heretofore duly served on the defendants Attorney to amend and correct the Judgement of this Court entered at its August term 1864 in this cause by substituting the word plaintiff instead of the word Defendant so that the said Judgment be for the plaintiff instead of Defendant the same being a mistake of the Court the Court being fully satisfied in the premises allows said motion, and the judgment is corrected accordingly.

Whereupon the defendant by his Attorney moves the Court for a new trial under the Statute, which motion the Court allows on payment of the Costs of the former trial.

Whereupon the following order appears of

Record

Mary Redfern vs Richard Redfern } Aug term 1865 Ejectment no 110

And now at this day to wit Wednesday August 30th 1865 this cause being called come the plaintiff by O'Melveny and Merritt her Attorneys and the defendant by Schaeffer his attorney and by agreement this cause is submitted to the Court for trial without a jury and the Court having heard the evidence and argument of counsel finds the defendant not guilty and gives judgment for the Defendant for costs. It is therefore ordered by the Court that said defendant do have of and from said plaintiff the costs herein expended and may have execution therefor &c

And afterwards to wit on the 18th day of September AD 1865 the Plaintiff files her Bill of exception which is in the words and figures following, to wit,

State of Illinois } In the Circuit Court of Marion
Marion County } County August term AD 1865

Mary Redfern vs Richard Redfern } Ejectment

Be it remembered that

on the trial of the above cause before the Hon Silas L Bryan Judge of the 2nd Judicial Circuit Court, in Marion County, by the Court (a jury by consent of parties being waived) the Plf to prove the issues on her part introduced the Deed of Richard Redfern, and Mary Redfern to Thomas F Hoots, to wit,

This Indenture made ~~and entered into~~ this ninth day of May in the year of our Lord One thousand eight hundred and sixty one - Between Richard Redfern and Mary his wife of the County of Marion and State of Illinois of the first part and Thomas F Hoots of same place of the second part; Witnesseth that the said party of the first part for and in consideration of One Dollar in hand paid by the said party of the second part the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged therefrom have granted bargained sold, remised released aliened and confirmed and by these presents do grant bargain sell remise release alien and confirm unto the said party of the second part and to his heirs and assigns forever all the following described lot piece or parcel of land situate in the County of Mari-

on and State of Illinois and known and described as follows, to wit Lots Number three (3) and Four (4) in Block Number two (2) in McElvains and Nichols intended addition to the Town of Salem

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof and all the estate rights titles interest, claim or demand whatsoever of the said party of the first part either in law or equity of in and to the above described premises with the hereditaments and appurtenances to have and to hold the said premises above bargained and described with the appurtenances unto the said party of the second part his heirs and assigns forever. And the said Richard Redfern and Mary his wife party of the first part their heirs executors and administrators do covenant grant bargain and agree to and with the said party of the second part his heirs and assigns that at the time of the ensealing and delivery of these presents they are well seized of the premises above conveyed as of a good sure perfect absolute and indefeasible estate of inheritance in law and in fee simple and have good right

full power and lawful authority to grant bargain sell and convey the same in manner and form aforesaid and that the same are free and clear from all former and other grants bargains sales liens taxes assessments and incumbrances of what kind or nature soever and the above bargained premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns against all and every person or persons lawfully claiming or to claim the whole or any part thereof. the said party of the first part shall and will warrant and forever defend.

In Testimony whereof the said party of the first part have hereunto set their hands and seals the day and year first above written

Signed sealed and delivered in the presence of } Richard his X mark Redfearn (Seal)
Mary her X mark Redfearn (Seal)

State of Illinois }
Marion County } ss

I Eligah Martin a justice of the peace in and for said County in the State aforesaid do hereby certify that Richard Redfearn and Mary his wife who are personally known to me as the real persons whose name are are subscribed to the above deed appeared before me this day in person and acknowledged that they

(4)

Executed and delivered the said Deed as her free and voluntary act for the uses and purposes therein set forth. And the said Mary wife of the said Richard Redferrin having been by me examined separate and apart from and out of the hearing of her husband and the contents and meaning of the said Deed having been by me made known and fully explained to her acknowledged that she had freely and voluntarily executed the same and relinquished her dower to the lands and tenements therein mentioned without compulsion of her said husband and that she does not wish to retract the same

Given under my hand and seal this ninth day of May in the year of our Lord One thousand eight hundred and sixty one

E Martin J P (L.S.)

Which was read against objection by Deft

2 The Plf next offered in evidence the Deed of Thomas F Hoots to the Plf in this suit, to wit

This Indenture made this ninth day of May in the year of our Lord One thousand Eight hundred and sixty one Between Thomas F Hoots of the County of Marion and State of Illinois of the first part and Mary Redferrin wife of Richard Redferrin of the same place of the second part Witnesseth that the said party of the first part for and in consideration of

[P.70-71]

One Dollar in hand paid by the said party of the second part the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged therefrom has granted bargained sold remised released aliened and confirmed and by these presents do grant bargain sell remise release alien and confirm unto the said party of the second part and to her heirs and assigns forever all the following described lot piece or parcel of land situate in the County of Marion and State of Illinois and known and described as follows to wit, Lots Number three /3/ and Four /4/ in Block number Two /2/ in McElwains and Nichols intended addition to the Town of Salem — Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof and all the estate rights titles interest claim or demand whatsoever of the said party of the first part either in law or in equity of in and to the above bargained premises with the hereditaments and appurtenances To Have and to Hold the said premises above bargained and described with the appurtenances unto the said party of the second part her

heirs and assigns forever And the said Thomas F Houts party of the first part his heirs executors and administrators doth covenant grant bargain and agree to and with the said party of the second part her heirs and assigns that at the time of the ensealing and delivery of these presents he is well seized of of the premises above conveyed as of a good sure perfect absolute and indefeasible estate of inheritance in law and in fee simple and has good right full power and lawful authority to grant bargain sell and convey the same in manner and form aforesaid and that the same are free and clear from all former and other grants bargains sales liens taxes assessments and incumbrances of what kind or nature soever and the above bargained premises in the quiet and peaceable possession of the said party of the second part her heirs and assigns against all and every person or persons lawfully claiming or to claim the whole or any part thereof the said party of the first part shall and will Warrant and forever Defend

In Testimony Whereof The said party of the first part has hereunto set his hand and seal the day and year first above written

Thomas F Houts Seal

Signed Sealed and delivered Seal
in the presence of
Elijah Martin

16

State of Illinois } ss.
Marion County }

I, Elijah Martin a Justice of the Peace in and for said County in the State aforesaid do hereby certify that Thomas D Routs who is personally known to me as the real person whose name is subscribed to the above Deed appeared befor me this day in person and acknowledged that he executed and delivered the said Deed as his free and volentary act for the uses and purposes therein set forth

Given under my hand and seal this Ninth day of May in the year of our Lord One thousand eight hundred and Sixty One

E Martin J P (L S)

Which was read against objection by Deft It was then admitted by both Plf & Deft that at the time of the commencement of this suit Deft was in possession of the lots described in the said Deeds and Plfs declaration It was further admitted that at the date of the Deeds Plf and Deft was husband and wife, and as such ~~made~~ deeded the premises described as their homestead. It was further admitted that before the commencement of this suit a divorce had been decreed to the Deft

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from the plf on the ground of Adultery
The Plf then called Henry T Redfern who
being sworn testified that he was the son of plf
& deft. That he was now of age but at the time
of separation of his father and mother in 1862
he was a minor that he had ever since lived in
the family of his mother & still lives with her
that his mother was living on the premises in
question when his father returned from the army
and that his mother declined living with his father
and that his father broke into the house by
force with an axe and had kept possession of
the house ever since That two of the minor
children lived with his father the Deft. That
Deft is married again since the divorce & lives upon the premises
This was all the evidence in the cause on either
side — Whereupon, and upon argument
of counsel the Court rendered verdict in
favor of the Deft.

Plf moved for new trial motion overruled
to which judge of the Court in overruling said
motion for a new trial the sd plf by her coun-
sel then & there excepted & prays that this
her bill of exceptions be signed and sealed
and made a part of the Record

Silas L Bryan (Seal)
Judge of the 2nd Judicial
Circuit Ill

[8470-9]

State of Illinois
Macon County

I Henry C. Moore Clerk of the Circuit Court in and for said County and State do hereby certify that the foregoing is a true copy of the proceedings had in the above entitled cause as appears of Record in my Office

Witness my hand and Seal of Office this 20th day of September AD 1875

H C Moore Clerk

and the pltff in error by H. K. S. O'Melveny his attorney comes & assigns for Error

1) That the court erred in giving judgment for defendant
2) The judgment of the court is against the law
3) The judgment of the Court is against the evidence
4) The court erred in not giving a new trial
5) The Court erred in giving judgment for costs the defendant has paid against pltff.

wherefore &c.

H. K. S. O'Melveny
attorney for Pltff in Error.

Supreme Court of the State of Illinois
First Grand Division

Mary Redfern
vs
Richard Redfern } Error to Madison

And the said Deft in Error by his Attorney Comes and says

1. That the Court did not err in giving judgment for the Deft
2. That the Judgment of the Court is not against the Law,
3. That the Judgment of the Court is not against the evidence,
4. That the Court did not err in not giving a new trial,
5. The Court did not err in giving judgment for Costs the Deft had paid, against Plaintiff.
6. That there is no error in the Record of the Court below

M. Schaeffer Atty for Deft in Error

[8670-9A]

Cilers Redfern
by
Richard Redfern

Founder in error

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Mary Redfern, Plff in Error

vs

Richard Redfern, Deft in Error

Record

Fees Paid

H C Moore

Septr 27th 1865

Service of process herein is waived and appearance entered

Richard Redfern

Per M. Schaffer his atty

Filed Nov. 7. 1865.

Noah Johnston Clk

Paid by Judge Allebury $5.00

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

MARY REDFERN,
vs.
RICHARD REDFERN.
} Error to Marion.

Page

BRIEF OF DEFENDANT IN ERROR.

1 The homestead right vests in the householder or husband. If there is no husband, it vests in the widow, If there is no father or mother, it is in the minor children.

2 A release or waiver of the homestead must be in writing, subscribed by such householder (and his wife, if he has one) and acknowledged in the same manner as other conveyances of real estate.

Treat, Scates' and Blackwell's Statutes, page 576 and 577.

3 A deed without the statutary relinquishment of the homestead is void.

Patterson vs. Kreig, 29 Ill. 518. Parder vs. Lindley, 31 Ill. 187.

4 A deed without waiver of homestead is inoperative until the possession is abandoned or surrendered to the grantee.

Brown vs. Coon, at Nov'r term, 1864, of this court.

5 In this case the possossion of the homestead was never surrendered by the def't; the property was occupied by him and his family when the deed was executed to Houts and ever afterwards. The def't on his return from the army entered upon the property with force, because he could not get possession of his own home without force.

6 The deeds from def't and pl'ff to Houts and from Houts to pl'ff were for a nominal consideration, implying that the then moving consideration was love and affection from def't to pl'ff. And during the absence of def't, pl'ff proved unfaithful to her marriage vows, and on his return she refused to live with def't, and compelled him to use force to enter his own homestead, which he had a right to do.

7 The def't submits that when there is a clear statutary provision, of which all persons are presumed to have knowledge, a failure to comply therewith in the execution of a deed does not imply fraud in law or in fact. "*Nemo videtur fraudare eos qui sciunt et consentiunt; i. e.*, No one is deemed to defraud those who know and consent.

8 From all the facts in this case, it appears that the homestead right was intentionally reserved by the def't.

M. SCHAEFFER,
Att'y for Def't in Error.

[1870-71]

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Redfern
vs
Redfern

Deft's Brief

8677

Filed Nov 8/65
A Johnston
Clerk

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

NOVEMBER TERM, 1865.

MARY REDFERN, Plaintiff in Error,
vs.
RICHARD REDFERN, Defendant in Error. } Error to Marion.

ABSTRACT.

PAGES

1 & 2 Declaration in ejectment.

3 Notice to defendant. Service.

5 Plea of general issue.

7 Trial and new trial allowed, under statute, upon payment of costs by defendant.

9 Cause tried by agreement before Court, at the August Term, 1865.

10 On the part of the plaintiff the following evidence was introduced, viz: A deed from Richard Redfern and Mary, his wife, to Thomas F. Houts, for Lots No. 3 and 4, in Block 2, in McElvaine & Nichol's intended Addition to the Town of Salem. The deed contains the usual covenants and is in the usual form.

13,14&15 Deed from Thomas Houts to Mary Redfern (plaintiff), in the usual form.

The defendant objected to the introduction of both deeds. Objections overruled and deeds read.

16 It was then admitted by both the defendant and plaintiff, that at the time of the commencement of this suit, defendant was in possession of the Lots described in said deeds and plaintiff's declaration. It was further admitted that at the date of the deeds plaintiff and defendant were husband and wife, and as such deeded the premises described as their homestead. It was further admitted that before the commencement of this suit a divorce had been decreed to the defendant from the plaintiff on the ground of adultery.

17 The plaintiff then further called *Henry Redfern*, who being duly sworn, testified: That he was the son of plaintiff and defendant. That he was now of age, but at the time of separation of his father and mother, in 1862, he was a minor; that he had ever since lived in the family of his mother, and lives with her still; that his mother was living on the premises in question when his father returned from the army, and that his mother declined living with his father, and that his father broke into the house by force, with an axe, and had kept possession of the house ever since. That two of the minor children lived with his father, the defendant. That defendant is married again, since the divorce, and lives upon the premises.

This was all the evidence in the cause.

9 Judgment for defendant.

ERRORS ASSIGNED.

1. The Court erred in giving judgment for defendant.
2. The judgment of the Court is against the law.
3. The judgment of the Court is against the evidence.
4. The Court erred in not giving a new trial.
5. The Court erred in giving judgment for costs the defendant had paid against plaintiff.

H. K. S. O'MELVENY,
Att'y for Pl'ff in Error.

SUPREME COURT OF THE STATE OF ILLINOIS.

FIRST GRAND DIVISION.

NOVEMBER TERM, 1865.

MARY REDFERN, Plaintiff in Error,
vs.
RICHARD REDFERN, Defendant in Error. } Error to Marion.

BRIEF OF PLAINTIFF IN ERROR.

I. Neither the deed to Houts, nor from Houts to Mary Redfern, plaintiff in error, specifically names the Homestead as conveyed, but the language of both the deeds does comprehend and embrace every claim, interest and estate, of whatever description, at law or equity, in express *terms*, which *terms* would clearly pass the homestead right, and unless those *terms* are wholly without force, the deed made to Houts by defendant in error estops him from claiming any right or interest in those premises. 2, Wat Mackeldey on Real property p. 482. Paragraphs, 37, 38, -

II. Patterson *vs.* Kreig, 29 Ill. 518, and Pardee *vs.* Lindly, 31 Ill. 187, are claimed as authority that in all cases, whether of forced sale or voluntary alienation, the husband and wife must join in a release, waiver or conveyance, in which the homestead is named as such, in the body of the deed and acknowledgment, before the homestead will pass. But in Smith *vs.* Mook, 26 Ill. 156, it is expressly held that the Act of 1861 has exclusive reference to forced sales, and (in Brown *vs.* Coon) at the last term of this Court, although no mention of the homestead in the deed was made, Brown lost his right of homestead, on the principle of abandonment. If the question is not closed we would, on those statutes, submit:

1. That the signature and acknowledgment of the husband alone, to a deed in fee, would pass all *his* title, rights and interests of *every kind*, and *did so* in this case; but not the *right* of the wife to the *Homestead*.

2. That the "*release or waiver*," is to the *law* of "Exemption," or the property exempted by law; to subject which to forced sale it must be in writing, signed by both husband and wife, and acknowledged for *that* purpose.

3. That the requirement of signature and acknowledgment of wife as "*condition to the alienation of the homestead*," was to protect the wife against the transfer by the husband *alone*, by his voluntary conveyance, and was not designed to effect deeds made in good faith, of husband and wife, by voluntary conveyance, as in this case.

III. 1. Plaintiff in error claims that she held the fee by the deed of Houts, and was in the actual possession and enjoyment of the premises as her *homestead*, at the time she was expelled by force—that she did not acquire it from her husband, and that under the law of 1861, p. 143, she had the legal right to the homestead and fee, and defendant's pretended right to the possession acquired by trespass *vi et armis*, is entitled to no respect in law.

2. But the object of the law is to give the wife a superior legal right to the Homestead; if the law is as contended for by defendant in error, she never parted with that right, and the fee having been acquired by her, the entirety of title and right was in her at the time of the expulsion. By his trespass he can gain no right.

IV. Whether the divorce was granted on the ground of adultery or not, can, we believe, in no degree effect the law in this case. Adultery would bar dower, but the right of homestead is a distinct and different right—and in this case both the homestead and fee simple title is in plaintiff in error, and no statute declares, for such offense, a forfeiture of her property.

H. K. S. O'MELVENY,
Att'y for Pl'ff in Error.

Woods' Excelsior Job Office Print, Cairo.

[8-70-13]

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Redfern

vs.

Redfern

Abstract & Brief

Filed Nov 8. 1865

A. Johnston Clk

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IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

MARY REDFERN,
vs.
RICHARD REDFERN.
} Error to Marion.

BRIEF OF DEFENDANT IN ERROR.

1 The homestead right vests in the householder or husband. If there is no husband, it vests in the widow, If there is no father or mother, it is in the minor children.

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6 The deeds from def't and pl'ff to Houts and from Houts to pl'ff were for a nominal consideration, implying that the then moving consideration was love and affection from def't to pl'ff. And during the absence of def't, pl'ff proved unfaithful to her marriage vows, and on his return she refused to live with def't, and compelled him to use force to enter his own homestead, which he had a right to do.

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M. SCHAEFFER,
Att'y for Def't in Error.

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Redfern
vs
Redfern

Deft's Brief

8670

Filed Nov 8/65
A Johnston

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

NOVEMBER TERM, 1865.

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vs.
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17 The plaintiff then further called *Henry Redfern*, who being duly sworn, testified: That he was the son of plaintiff and defendant. That he was now of age, but at the time of separation of his father and mother, in 1862, he was a minor; that he had ever since lived in the family of his mother, and lives with her still; that his mother was living on the premises in question when his father returned from the army, and that his mother declined living with his father, and that his father broke into the house by force, with an axe, and had kept possession of the house ever since. That two of the minor children lived with his father, the defendant. That defendant is married again, since the divorce, and lives upon the premises.

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H. K. S. O'MELVENY,
Att'y for Pl'ff in Error.

[8670-15]

SUPREME COURT OF THE STATE OF ILLINOIS.

FIRST GRAND DIVISION.

NOVEMBER TERM, 1865.

MARY REDFERN, Plaintiff in Error,
vs.
RICHARD REDFERN, Defendant in Error.
} Error to Marion.

BRIEF OF PLAINTIFF IN ERROR.

I. Neither the deed to Houts, nor from Houts to Mary Redfern, plaintiff in error, specifically names the Homestead as conveyed, but the language of both the deeds does comprehend and embrace every claim, interest and estate, of whatever description, at law or equity, in express *terms*, which *terms* would clearly pass the homestead right, and unless those *terms* are wholly without force, the deed made to Houts by defendant in error estops him from claiming any right or interest in those premises. 2 Vol Brathelmus on real property page 482 paragraphs 37-38-39

II. Patterson *vs.* Kreig, 29 Ill. 518, and Pardee *vs.* Lindly, 31 Ill. 187, are claimed as authority that in all cases, whether of forced sale or voluntary alienation, the husband and wife must join in a release, waiver or conveyance, in which the homestead is named as such, in the body of the deed and acknowledgment, before the homestead will pass. But in Smith *vs.* Mook, 26 Ill. 156, it is expressly held that the Act of 1861 has exclusive reference to forced sales, and (in Brown *vs.* Coon) at the last term of this Court, although no mention of the homestead in the deed was made, Brown lost his right of homestead, on the principle of abandonment. If the question is not closed we would, on those statutes, submit: are

1. That the signature and acknowledgment of the husband alone, to a deed in fee, would pass all *his* title, rights and interests of *every kind*, and *did so* in this case; but not the *right* of the wife to the *Homestead*.

2. That the "*release or waiver*," is to the *law* of "Exemption," or the property exempted by law; to subject which to forced sale it must be in writing, signed by both husband and wife, and acknowledged for *that* purpose.

3. That the requirement of signature and acknowledgment of wife as "*condition to the alienation of the homestead*," was to protect the wife against the transfer by the husband *alone*, by his voluntary conveyance, and was not designed to effect deeds made in good faith, of husband and wife, by voluntary conveyance, as in this case.

III. 1. Plaintiff in error claims that she held the fee by the deed of Houts, and was in the actual possession and enjoyment of the premises as her *homestead*, at the time she was expelled by force—that she did not acquire it from her husband, and that under the law of 1861, p. 143, she had the legal right to the homestead and fee, and defendant's pretended right to the possession acquired by trespass *vi et armis*, is entitled to no respect in law.

2. But the object of the law is to give the wife a superior legal right to the Homestead; if the law is as contended for by defendant in error, she never parted with that right, and the fee having been acquired by her, the entirety of title and right was in her at the time of the expulsion. By his trespass he can gain no right.

IV. Whether the divorce was granted on the ground of adultery or not, can, we believe, in no degree effect the law in this case. Adultery would bar dower, but the right of homestead is a distinct and different right—and in this case both the homestead and fee simple title is in plaintiff in error, and no statute declares, for such offense, a forfeiture of her property.

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Abstract & Brief

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A. Johnston Clk