

Supreme Court....Second Grand Division.

JANUARY TERM, A. D. 1863.

ROBERT SOUTHWELL,)
vs.)
JAMES ELLIS ET AL.)

POINTS FOR DEFENDANTS.

1st. It sufficiently appears upon a reading of the whole decree, that the cause came on for hearing upon the bill, answers, cross-bill, exhibits and evidence in the cause, that the defendants had been ruled to answer, and made default. The default is not specifically stated to have been both to the original and cross cause, but by fair intendment the court must so take it—and it recites that evidence was heard.

2d. The second error is not well assigned and can avail nothing.

It may be admitted that there was error in the court ordering the surplus on the sale of the mortgaged property to be paid to a party who had established no right to it; but this has not injured the plaintiff. The report of the sale shows there was no surplus. And if error at all it does not vitiate the whole decree, but only *pro tanto*. And even a partial reversal should be without costs, as it has in no wise injured the plaintiff.

HAY & CULLOM.

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Ellis et al

Prints per dept

JAMES ELLIS ET AL
ROBERT SOUTHWELL

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Supreme Court... Second Circuit Division

JANUARY TERM, A. D. 1883

NAV & CUSTOM

Supreme Court....Second Grand Division.

JANUARY TERM, A. D. 1863.

JAMES ELLIS
vs.
ROBERT SOUTHWELL. } Error to Scott.

ABSTRACT.

- 1, 2, Robert Southwell defendant in error filed his bill to the October Term, 1860, of Scott County
3, Circuit Court, to foreclose a mortgage made by complainant in error to defendant on land described therein to secure \$1000. Making also Weinhausen & Hornbostle, St. Louis, Wm. W. Chapman of Scott county, and Thomas Ellis and wife of Pike county, subsequent mortgagees, co-defendants.
- 4, 5, Mortgage referred to.
- 9, 10, Amended Bill of Southwell praying decree for his debt and sale of mortgaged premises in usual form, against same parties as in original bill, and one Whitehurst filed April Term 1861.
- Defendant Chapman below disclaims by answer and bill dismissed as to him.
- 13, 14, Weinhausen & Hornbostle file answer, at the same term, setting up a subsequent mortgage on the same premises to secure \$583 56 due them on note of complainant in error.
- Default entered against James Ellis and wife (complaints in error) and against Thomas Ellis.
- 15, 16, Weinhausen & Hornbostle file, at same term, their cross-bill praying in usual form for foreclosure of their subsequent mortgage, exhibiting mortgage and note, and making complainant in error and his wife, Wm. W. Chapman, Robert Southwell (defendant in error), Thos. Ellis, and Jesse G. Whitehurst, defendants;
- 17, 18, Weinhausen & Hornbostle's mortgage before referred to, and note by copy.
- No answers are filed to cross-bill, no default taken, and no notice taken of the cross-bill; no evidence produced except the copies of notes & mortgages exhibited, in favor of Southwell and in favor of Weinhausen & Hornbostle. No evidence was introduced or exhibited by defendant Thomas Ellis.
- 19, 20, The Court decreed in favor of Deft. in error \$1098 42 and, subject thereto, to Weinhausen &
21, Hornbostle \$722 15 to be paid in 30 days from adjournment, and in default that the mortgaged premises be sold &c. and proceeds applied first to satisfy the decree of defendant in error. 2nd to satisfy the decree in favor of Weinhausen & Hornbostle, and
- 3rd. *That the Master in Chancery apply any overplus to any indebtedness that said James Ellis may owe the said Thomas Ellis on any incumbrance on said premises herein described.*
- 22, 23, The premises were sold for \$1154 85, defendant in error being purchaser, and certificate executed. (Master's Rep.)

ERRORS ASSIGNED.

- 24, 1. The court erred in rendering the decree upon the evidence disclosed by the record.
- 2d. The court erred in rendering a decree in favor of Thomas Ellis without proof and without any thing in the record to justify such decree.
- 3rd. The court erred in rendering a decree in favor of Weinhausen & Hornbostle upon their cross-bill without entering the default of the defendants thereto, and without legal proof of their claim.

BRIEF.

1. No decree can be rendered upon a bill in Chancery except upon confession appearing of Record, or upon proof; when upon proof, the best evidence must be produced. Decree of W. & H. is therefore erroneous.

A defendant cannot have a decree granting him affirmative relief without asking it by cross-bill. Decree in favor of Thomas Ellis is therefore erroneous.

KNAPP & BURR, For Plaintiff in Error.

Plaintiff in Error of Thomas Ellis is the same person.

A defendant cannot have a person named him affirmative right without making it a case.

It is the same person.

No person can be named when the name is not subject matter for protection. Deceased of W. A.

BRIEF.

It is the same person.

The court says it is the same person. It is the same person. It is the same person.

The court says it is the same person. It is the same person. It is the same person.

THINGS ASSIGNED.

It is the same person.

The court says it is the same person. It is the same person. It is the same person.

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Ellis

vs

Smithwell

Abstract.

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ROBERT SMITHWELL.

JAMES ELLIS.

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