

46

IN THE
SUPREME COURT OF ILLINOIS,
Third Grand Division.

April Term, A. D. 1862. 4

Valentine H. Marshall,
James Dickson,

Appellants.

vs.

Elijay Barr,

Appellee.

APPELLANTS' POINTS.

This is an action of ejectment, tried before the court at the Warren county circuit.

The plaintiff's title was a deed from Valentine H. Marshall to him, of the premises in controversy, for the expressed consideration of \$4,000, dated —

Marshall's wife did not join in the deed, nor was there any release or waiver of the homestead right. At the time of the execution of the deed, Marshall was the owner and in the occupation of the premises, while his family, consisting of a wife and several children, some of whom were under the age of twenty-one years Marshall afterwards left the country, his wife and children in the meantime continuing in the occupancy of the property, claiming it as a homestead, and are still occupying the same; some of the children are yet minors.

The deed to Marshall, as appears by his answer in a chancery suit, was made for the security of the payment of about \$600, and intended as a mortgage security, merely.

The only question which we propose to discuss, is, whether, under

*Filed April 26. 1864
C. C. and O. R.*

the homestead exemption law of the State, the plaintiff under this state of facts, has shown such a title to the property, as will enable him to sustain ejectment.

The first section of the homestead act of 1851, after exempting from levy and forced sale under any process, or order from any court of law or equity in this State, for debts contracted from and after the 4th day of July, 1851, the lot of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, also provides that such exemption shall continue after the death of such householder for the benefit of the widow and family, some or one of them continuing to occupy such homestead, until the youngest child shall become twenty-one years of age and until the death of such widow, and no release or waiver of such exemption shall be held valid, unless the same shall be in writing, subscribed by such householder and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged.

In 1857 this act was amended by requiring the wife to join in the release or waiver, and also declaring the object and intent of the act in these words: "It being the object and intent of this act, to require in all cases, the signature and acknowledgement of the wife *as conditions to the alienation of the homestead.*"

The exemption given by this statute is still in force; the property is still occupied as a residence by the wife of Marshall and her minor children, and claimed as a homestead. That homestead right has never been released or waived. Marshall's wife is not a party to the deed, and the language of the statute is most explicit upon that point; this release or waiver by the wife is a necessary condition to the *alienation* of the homestead, not merely of *her rights* but of the *homestead* itself. The word alienation, when applied to transfers of real property, is of the broadest and most comprehensive significance, it embraces not only the right to the possession, but the *title* also. In *Bouvier's Law Dictionary*, page 92, it is thus defined, "Alienation is an act whereby one man transfers the *property and possession* of lands, tenements, or other things to another." The legislature has itself construed the act, so far as the necessity of the wife releasing or waiving her right is concerned, and declare that unless she does so release or waive that right, neither the *title nor*

the right to the possession shall be transferred by the deed, and hence under this construction of the act, thus made by the legislature, Elijah Barr, the grantee of Valentine H. Marshall, derived neither title to the property in question, *nor right to its possession*; the only condition upon which that title and right of possession could be conveyed, not having been complied with.

And this too is the construction placed upon the act by this court.

Thus in *Vanzant vs. Vanzant*, 23 Ills., 541, Mr. Justice Breese, after declaring that "the controlling consideration with the legislature, in passing the act, was the family of the householder; it was for their benefit, rather than for that of the householder;" that there must be "a writing expressly manifesting the intention to waive or release, and that writing must be signed by the party releasing, and it must be acknowledged as an ordinary deed is acknowledged;" that as regards the wife, a fair construction of the act, taken in connection with the conveyance act, "would require that the officer taking the acknowledgment of the wife should certify, also that he fully informed her of her rights under the act, and that she voluntarily released or waived all right and benefit under it;" with reference to the mortgage in that case says; "The mortgage in this case, to Isaiah Vanzant, was executed in the ordinary way, and contains no release or waiver of the homestead act by John A. Vanzant, the householder, and then, in the actual occupancy of the premises, residing thereon, with his family. The benefits of the act not having been released or waived, *they remained in the family for their benefit*, and to continue up to, and after the death of the householder. Whilst he lives, the right exists so long as there remains a family to enjoy it; when he dies, the exemption continues after his death, for the benefit of the widow and family, some, or one of them continuing to occupy such homestead, until the youngest child shall become twenty-one years of age, and until the death of such widow. * * * * "As a home, and as their home, *it has never been granted away*, or the right to occupy it released or waived by any one competent to release or waive it." And again, "*The right to the property as a homestead*, has never been surrendered, released or waived.

Again, in *Green vs. Marks et al.*, 25 Ills. 222, Mr. Justice Walker, with reference to this statute, says: "By this enactment, the debtor

falling within its provisions, is required to perform no act, to discharge no duty, or even manifest any intention to avail himself of its benefits. *The law casts it upon him*, but at the same time, has provided the means, by which he may, if he shall choose, waive that benefit. *But until he does so, or until some one of the circumstances, which is essential to the operation of the statute, ceases to exist, the exemption continues by its own force."*

The equities of this case are strongly against the appellee; and there is every reason why the statute should be enforced against him. To hold that, by the deed, under which he claims, he has acquired neither property in, nor right to the possession, of this homestead, is not only doing no injustice to the spirit of the statute, but is simply following the construction which the legislature has imperatively, and most unmistakably, placed upon it. The property has never yet been *alienated*. Neither *title* nor *possession* has ever been vested in the appellee. After Marshall has left the country, his wife and children remaining upon the property, which they have always occupied and claimed as a homestead; it is sought to drive them from that home, under an instrument which carries a falsehood upon its face, purporting to be an absolute conveyance of the title, for the consideration of \$4000; when in fact, it was simply given as security for the payment of only about \$600.

No stronger case can well be presented for the interposition of this court, nor a stronger argument afforded of the justice, wisdom and necessity of the homestead exemption. In this connection, the language of Mr. Justice Breese, in *Deere vs. Chapman*, 25 Ills. 612, is most apposite: "We regard," he says, "the statute as remedial in its nature; intended to remove grievances, under which the unfortunate labored, and to save them, amid all their losses and disasters, a shelter for the family—a home. Being remedial, it must be so construed as most effectually to meet the benevolent end in view, without departing, however, from the plain and obvious meaning of the language used in the act."

The question made at the Circuit, as to the right of a mortgagee to maintain ejectment, after condition broken, having been expressly decided in 26 Ills. 1, we do not propose to discuss it.

E. S. SMITH, For APPELLANTS.