No. 13931

Supreme Court of Illinois

Brokaw

---

vs.

Ogle et al.

Supreme Court of Illinois
Central Grand Division
January Term 1897

Charles Brokaw, Appellant
vs.
Alexander Ogle et al.
Appellees

Statement of Case:

This is a bill for partition filed by appellant on June 21st 1895, and subsequently amended, to which, as ~~at~~ originally drawn and as subsequently amended, Alexander Ogle and Hiram Ogle and their wives, and one A. G. Crawford, holding a mortgage upon the premises sought to be partitioned, were made parties defendant. The premises were owned in his lifetime by Zachariah Ogle, who died intestate, leaving a widow, Frances Ogle, and four children, to-wit: Alexander, Hiram and Malcolm Ogle, and Nancy J. McMullin, and one grandchild, James E. Fowler, the son of a deceased daughter, who died before her father. Alexander and Hiram Ogle purchased the interests of the other heirs, so that each owned an undivided half, subject to the dower and homestead of the widow. Complainant ~~the~~ levied upon the undivided half owned by Alexander Ogle under a judgment against Alexander Ogle, and obtained a sheriff's deed thereto. The Court below dismissed the bill, finding that the premises were Alexander Ogle's homestead, and that, as no proceedings were taken to set off the homestead, the

execution sale was void, and complainant was not entitled to partition.

The present appeal is prosecuted from such decree of dismissal.

(14-9)

Opinion
by

Magruder J.

The farm in question consisted of 160 acres. When Zachariah Ogle, who owned the fee simple title to it, died on December 14, 1888, he occupied the house upon it as a residence. The house so occupied by him was upon the west half of the farm. Before and at his death, he was a householder and had a family, and was entitled to an estate of homestead to the extent in value of $1000.00 in the farm and buildings thereon. His homestead and all right and title therein, were exempt from attachment, judgment, &c, as provided in section 1 of the Exemption Act. (2 Starr & Cur. Stat. 2d ed. p. 1865).

Frances Ogle, the wife of Zachariah Ogle, survived him, and continued to live in the house upon the west half of the farm. "Such exemption" continued after the death of her husband for the benefit of herself, as long as she continued to occupy the homestead, and of her children, until the youngest child became twenty-one years of age, in accordance with the provisions of section 2 of the Homestead Act. (2 Starr & Cur. Stat. 2d ed. p. 1871). It appears that in October, 1891, all of her children, and her grandson, were of age. At that time Malcolm Ogle, her youngest son, and James E. Fowler, her grandson, conveyed their two-fifths'

interest in ~~the~~ the farm to their older brothers, Alexander Ogle and Hiram Ogle. On May 29, 1893, her daughter, Nancy J. McMullin, conveyed her one-fifth interest to said Alexander and Hiram. At the latter date, Alexander Ogle and Hiram Ogle owned the whole farm, each an undivided one-half thereof, subject to a mortgage ~~for~~ drawing 10% per cent interest, thereon, dated May 21st, 1893, for $950.00, executed by them to one Crawford, and subject to the dower of the widow, Frances Ogle, and to her right of homestead.

On May 29th, 1893, Mrs. McMullin, who had a ~~family~~ husband and family, ~~of~~ lived in her own home, and not with her mother. Hiram Ogle lived with his family ~~upon~~ in a house upon the east half of the farm. Whether this house was built before his father's death, or thereafter, does not appear; but he lived there ~~in~~ in pursuance of an oral agreement for partition between himself and his brother, Alexander, by the terms of which he was to take the east half and Alexander the west half of the farm. The right of Alexander to the west half was subject, however, to the right of occupancy thereof by his mother as long as she lived. Alexander Ogle in 1893, and for some years prior thereto, cultivated a farm in what is called the "Log bottom", about eight miles from the home farm above referred to. This farm he did not own, but had leased it from the owner thereof. He lived upon it with his wife and children most of the time, although he also lived with his mother in the house upon the west half of the home farm a part of the time. Malcolm Ogle was a single man, and lived ~~at~~ in the same house with his mother a portion of the time before her death,

which occured on April 10th, 1894, but just when he lived there is not shown by the evidence; ~~except that~~ it is clear, however, that he did not live there while the premises were in the occupancy of one Frank Black, a tenant of ~~under~~ the widow, Frances Ogle, as hereafter stated.

The appellant obtained a judgment against Alexander Ogle for $116.00 before a justice of the peace on June 16, 1893, ~~The transcript of the record and~~ and, after execution returned nulla bona, a transcript was filed in the circuit court of Pike County on December 11, 1893, and an execution was issued and levied upon the undivided one-half ~~of said farm~~ interest of said Alexander Ogle in said farm. The premises so levied upon were sold by the Sheriff on February 24th, 1894, for $145.45 under the ~~the~~ execution aforesaid to the appellant, and, not having been redeemed from such sale within the statutory period, were conveyed to appellant by Sheriff's deed, dated May 27th, 1895.

Appellant ~~claims to~~ seeks partition, as being the owner of an undivided one-half of the premises in question by virtue of his Sheriff's deed. Appellee, Alexander Ogle, claims that the Sheriff's sale was void upon the alleged ground, that, when ~~when~~ the transcript from the justice of the peace was filed in the circuit Court, and when the levy and sale were made, he was occupying the premises as his homestead, and said premises were worth less than $1000.00. No steps were ever taken to set off the homestead in the manner prescribed by the statute. ~~Even if it could be given that the land~~ [illegible]

(14-7)

A sale on execution of the homestead of the judgment debtor without observing the requirements of the statute in that behalf is void so as to convey no title, capable of being asserted in a court of law. (Bullen vs. Dawson 139 Ill. 633, & cases there cited). Where the homestead premises are not worth more than $1000.00, a judgment against the owner is no line upon them, and, when the debtor sells them, the purchaser takes them to that extent free from all judgment liens. The debtor's homestead to the extent of $1000.00 in value is exempt from levy and forced sale. (Asher vs. Mitchell 92 Ill. 480; Leupold vs. Krause 95 Ill. 440; Halliday vs. Hess 147 Ill. 588; Bach vs. May 163 Ill. 547).

The testimony is not altogether clear as to the value of the interest levied upon & ~~Alexander~~ and Hiram Ogle paid about $900.00 for the three-fifths' interest purchased by them in 1891 and 1893, that is to say, about $300.00 for each one-fifth. No other proof of value appears in the record. At these figures, the value of the whole farm would not be over $1500.00, and after deducting the mortgage of $950.00 and interest, the undivided half levied upon would be worth only about $500; and Counsel for appellees estimate the value of the whole premises, upon the basis of the amounts at which those purchases were made, to be ~~[illegible]~~ $2000.00

will make the value of the undivided one half, which was levied upon, less than $1000.

There is conflict in the authorities upon the question, whether there can be a homestead in an undivided interest in land, or, in other words, whether an estate in ~~common~~ co-tenancy will support a right of homestead in one of the co-tenants, or whether homestead can only exist in an estate in severalty. (Thompson on Homestead & Ex. secs 180 & 189; Waples on Homestead & Ex. pp. 134 & 138). We are inclined to the opinion, that an undivided interest, accompanied by exclusive possession, will support the homestead right. (Herdman vs. Cooper 29 Ill. App. 589; Kaser vs. Voss 27 Minn. 406; Freeman on Co-Tenancy & Par. sec. 54; Thompson on Homestead & Ex. sec. 181). The objection usually urged against allowing a homestead estate to attach to an undivided interest is, that, in setting off the homestead, the rights of the co-tenants may be interfered with, and the particular part, set off as a homestead, might, on partition, fall to one of the other co-tenants. But this is a matter of which the other co-tenants alone ~~and not third persons~~ can complain, and, if their rights are respected, ~~others cannot object.~~ persons who are not co-tenants, ~~cannot complain have no right to~~ cannot object. The object is to protect the portion set off from judgment levies and sales, and not to give an assured title thereto. The co-tenant of the claimant of a homestead cannot question the latter's "right to acquire a homestead interest in the property, so ~~law~~ long as such co-tenant is allowed to enjoy all his rights and privileges in and to said property as a co-tenant." (Tarrant vs. Swain 15 Kan. 149).

14-8

We do not, therefore, regard the fact that Alexander Ogle's interest in the farm was an undivided one-half thereof, as militating against his claim to a homestead, if in other respects his right thereto is established. Especially is this so, in view of the arrangement with his brother, Hiram, the owner of the other undivided half, as to a ~~book~~ partition, ~~and~~ which was to give ~~him~~ the west half ~~and~~ to Alexander and the east half to Hiram. Of this, however, the judgment creditor had no notice.

Nor can it be doubted, that, if Alexander did have a homestead, the sheriff's sale of it was absolutely void, it being less in value than $1000.00. The question, which it has been most difficult for us to decide, is the question whether his occupancy of the premises, if he occupied them, was of such a kind as to bring it within the requirements of the statute as to homesteads. It will be noticed, that the filing of the transcript, and the levy upon and sale of the property, all took place in ~~the~~ the lifetime of his mother, the widow of Zachariah Ogle. The homestead exemption continued for her benefit after her husband's death. It is true, that her homestead was never assigned to her by any formal proceeding, but she was permitted by the sons to reside in the house on the west half of the farm, and to receive the rents thereof from the time of her husband's death to the date of her own death. It was called her homestead and treated and regarded as such. Sometimes her son, Alexander, occupied the house with her, and called it his homestead. He had some furniture there which he never removed, but most of the time he lived with his

family upon another farm distant eight miles, which he rented and cultivated. Mrs. Frances Ogle seems to have been in feeble health during the later years of her life and spent some of her time visiting in Indiana, and some of her time with her daughter, Mrs. Mc. Mullin; but she never abandoned the premises. During the last six months of her life, she was at the house of Mrs. Mc Mullin. On November 4th, 1893, she leased the homestead premises to one Frank Black, who occupied them as her tenant until four or five days before her death on April 10th 1894. This lease was made for her by her daughter Mrs. McMullin, and the rent paid by Black was paid for her use to Frances Ogle, and not to Alexander. While Black occupied the premises, Alexander Ogle was living upon his farm in the "Suy Bottom", and did not take possession of the homestead until Black left, and until a few days before his mother's death. ~~While~~

While Black was in possession as tenant, the transcript was filed, and the execution was issued and levied, and the sale was made. Surely this was during the existence of the homestead right in Mrs. Ogle, and during the possession of the homestead by her. Whatever rights Alexander had in the homestead, even when he occupied it with his mother, were subordinate to her homestead rights. She was the householder. ~~Her~~ Her youngest son, Malcolm, ~~occupied~~ may have lived with her up to the time of the lease to Black. But, whether he did or not, she was not deprived of her homestead by the fact, that her children were ~~grown up~~ of age, and, except one, lived to themselves and had families of their own. "A widow without children is as much

entitled to retain the homestead of her husband as one with children, for she may occupy it herself, with servants, or alone, if she chooses. But if it is more convenient or profitable ~~to her~~ for her, what reason is there why she may not let it to another, for a term of years, until she may wish to return to it?" (White vs Plummer 96 Ill. 394).

If the present case was one where the execution ~~we~~ had been levied upon the homestead estate of Mrs. Ogle, a different question would be presented. In such case, the levy and sale would be void and of no effect. But the question here is, whether an adult ~~wife~~ son, ~~of the surviving wife, which the latter in possession her mother is in possession of the homestead~~ having a wife and children of his own and engaged in cultivating a distant farm, can, by occasionally occupying the homestead of his mother, his father's surviving wife, or by leaving some of his furniture in his mother's homestead, claim her homestead as his own, or claim to have a joint homestead with her, so as to protect the interest, which he owns as heir of his father in the homestead property, from being subjected by his creditors to the payment of his own individual debts. This question must be answered in the negative.

"The estate of homestead in a widow in the lands, of ~~her husband~~ which her husband died seized, is a conditional life estate, subject to the joint right of occupancy of the children of the deceased husband during the minority of the youngest thereof. The estate is upon condition, that it shall not be voluntarily surrendered or abandoned." (Jones vs. Gilbert 135 Ill. 33).

It ~~could~~ cannot be claimed, that the widow surrendered or abandoned the homestead, because she went to her daughter's house to be taken care of during her last sickness, and rented the ~~+~~ homestead place during her absence, in order to get income enough from it to pay the expenses of her sickness. (Walker vs. People 18 Ill. 194; Browning vs. Harris 99 Ill. 456; Hagerty vs. Hagerty 149 Ill. 655).

Where the head of the family, having an estate in fee in the homestead premises, dies, ~~and~~ the right of the homestead devolves upon the surviving wife by operation of law. A life estate is carved out of the fee for her estate of homestead. The heirs take a reversionary interest, or remainder, expectant upon the termination of the estate for life and for years created by the statute. (Browning vs. Harris supra; Jones vs. Gilbert supra; Kitterlin vs. Milwaukee Mech. Ins. Co. 134 Ill. 647; Merritt vs. Merritt 97 Ill. 243).

~~The particular estate~~ If there is no will, the homestead premises are vested in the heirs, subject to the particular estate ~~for life~~ or right of occupancy for life, which is given to the widow. The partition Act, which went into force in 1874 after the Homestead ~~Act~~, which went into effect in 1873, expressly provides for the partition of premises inherited by heirs, subject to dower and the estate of homestead. (Merritt vs. Merritt supra; 3 Starr & Cur. Stat. — 2 ed. — p. 2921).

The interest of the heir may be levied upon and sold subject to the homestead right, speci-

ally when the homestead has not been assigned. We see no reason why the appellant, as a judgment creditor, could not levy upon and sell the interest of Alexander Ogle, subject to the homestead right of Mrs. Ogle. In Hartman vs. Schultz 101 Ill. 437, it was held, that no sale can be rightfully made of the homestead by the administrator of the deceased householder to pay his debts, when the property does not exceed in value $1000.00, until the exemption in favor of the widow and minor children has been in some mode terminated; and that the homestead, when not exceeding $1000.00 in value, cannot even be sold subject to the homestead right. But it has never been held, that a judgment against one of the heirs cannot be enforced against his undivided interest, subject to an unassigned right of homestead in the #

The widow, being the head of the household, owns the homestead estate during her life and until the youngest child becomes twenty one years old. The word, "householder," means the head, or person, who has the charge of the family, and does not apply to the subordinate members or inmates of the household. (Thompson on Homestead & Ex. sec. 45; Waples on Homestead & Ex. p. 58). It was held in Zander vs. Scott 165 Ill. 54, that a householder may not necessarily be the head of a family; but in that case it appeared that the husband and wife lived together, and had children, and the wife owned the fee of the homestead property; and it was held, that she was a

widows. (Waples on Homest. & Ex. p. 652; Hartig vs. Leinsheimer 87 Ill. 236; Thompson on Homest. & Ex. sec. 273)

householder having a family, although not the head of the family. The ordinary signification of a householder however, is, that such a person is the head of the family, upon whom the other members are dependent. The family, within the meaning of the homestead law, consists of those members of the household, who are dependent upon the householder for support, or to whom the householder owes some duty. (Kolubaeh vs. Wilson 15 Fla. 148). To constitute a homestead, there must be a householder and a family. There cannot be two householders. If Mrs. Ogle was here the head of the household, or the householder, her son, Alexander, could not also be the head of the family or the householder, even though he lived with his mother a part of the time. It certainly cannot be said, that, having a family of his own, whom he supported by operating a distant and independent farm, he occupied any relation of dependence, so far as his mother was concerned.

If Alexander Ogle had a homestead in these premises, then as his mother also had a homestead, each would be entitled to have a homestead set off. But two separate homesteads, thus laid off and described, cannot exist in the same land at one and the same time. (Murchison vs. Plyler 87 N. C. 79). Moreover, homestead involves a present right of occupancy. As Mrs. Ogle was life tenant, she was entitled to the present right of occupancy, but as Alexander Ogle was only a remainder-man or reversioner,

his right of occupancy could not attach until the expiration of the life estate. The provisions of law in reference to a homestead do not apply to a remainder dependent upon a life estate. (Mercheiser vs. Myler supra)

Both the widow and the remainderman cannot have a homestead in the same tract of land. (Merrifield vs. Merrifield 82 Ky. 526). Nor can a homestead be occupied jointly with another person, so as that both shall have estates of homestead within the meaning of the statute. (Cornish vs. Frees 74 Wis 490; Kyle vs. Wills 166 Ill. 501).

In Freeman, in his work on Executions, says; "The homestead right, if any exists, is in the holder of the estate in possession. Hence, a reversioner or remainderman, because his estate is incompatible with the existence of a homestead in fact, cannot secure an exemption from forced sale by claiming it as a homestead." (1 Freeman on Ex. 2d Ed. - Sec. 242). Waples, in his work on Homestead and Exemption, says; "Upon the death of the father, the mother succeeds to the headship of the family." (Waples on Homestead & Ex. p. 644).

(14-11)

In Cornish vs. Frees, supra, a father entered into ~~and~~ possession of certain premises, and, dying, devised them to his widow for life, and on her death to his two sons. One of the sons, being an adult, ~~was the eldest in possession~~ and having a wife, lived with his wife upon the premises, and his mother, his father's widow, also lived thereon; and it was held, that the son ~~and his wife~~ did not have a homestead in the premises, but that he was in possession under and with his mother; and that he and his wife

did not "own and occupy" the premises in the sense of the homestead law, but held possession under the widow, who remained in possession after her husband's death and had ~~one~~ a life estate under his will; it was there said: "A homestead cannot be jointly held with another".

In Kyle vs. Wills, supra, we have recently held, that the estate of homestead devolves upon the widow, by operation of law, eo instanti upon the death of her husband, and continues for the ~~benefit~~ benefit of the widow and children until the youngest becomes twenty-one years of age; but that this benefit does not extend to married children, having families and homes of their own. So here, Alexander Ogle had no homestead in the premises occupied by his mother, which entitled his interest to exemption from execution sale.

We are not prepared to say, that the consideration, for which the interest of Alexander Ogle was purchased by the appellant, was grossly inadequate. At the time of the levy and sale, ~~it~~ it was not worth, with the mortgage upon it, more than about $500.00 according to the contention of the appellees. In addition to this, it was at that time, subject to the widow's dower and homestead. It is true, that inadequacy of consideration will sometimes justify a court of equity in setting aside a judicial sale, when such inadequacy is coupled with circumstances of irregularity or fraud. (Parker vs. Shannon 137 Ill. 382; Bach vs May 163 Ill. 550; Bullen vs. Dawson 139 Ill. 633). But, in the case at bar, ~~if there is inadequacy of consideration~~ there were no circumstances of irregularity or fraud attending the sale, ~~to put or tend to disclose~~ even if the consideration therefor was inadequate, the Sheriff's deed was ~~it~~ not, therefore, invalid.

Moreover, the ~~appellees, defendants~~ appellee, Alexander

Ogle, filed no cross-bill, setting up any equities, or asking that the sale be set aside. The case, as presented by the record, is an ordinary bill for partition; ~~the~~ and the answer merely sets up, that the complainants' title under the sheriff's deed was void because ~~where the alleged grounds that~~ the defendant is claimed to have had a homestead in the premises, which was not set off to him. This claim cannot be sustained under the facts of this case.

The decree of the Circuit Court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed & Remanded.

Docket No. 70 Agenda No. 46

Supreme Court of Illinois
~~Fourteen~~ Central Grand Division

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Statement of Facts
&
Opinion
by
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Appeal from Pike

O. R.

Dissent filed herewith

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14-12

~~Dissenting opinion by~~

Mr. Chief Justice Phillips, ~~C.~~ J. dissenting:

To the extent ~~that~~ this opinion holds that the interest of a tenant in common will support a right of homestead in and of the cotenants in such premises I cannot concur.

14-12

~~Dissenting opinion by~~

Mr. Chief Justice Phillips, ~~C. J.~~ dissenting:

To the extent ~~that~~ this opinion holds that the interest of a tenant in common will support a right of homestead in and of the tenants in such premises I cannot concur.

~~causes to attach property held~~
~~in common have an estate~~
~~of homestead therein.~~ On this
question the authorities are
conflictory. It has been held that
an estate in common will
support a right of homestead in
one of the co-tenants in ~~that~~ Vermont, Iowa, Texas, Kansas, New
Hampshire and Arkansas. Whilst the stat-
utes of these states are not the same,
the general principle on which
they sustain the right of homestead
in a co-tenant is, that whilst
such right cannot be enforced
hostile to a co-tenant or one
holding under him, yet third
persons, nor a co-tenant, cannot
question his right to acquire a
homestead interest in the property,
so long as his co-tenant is allow-
ed to enjoy all his rights and
privileges in such property, and no
third person should be permitted to
avail himself of the law of co-ten-

any for his own gain. That an estate in common will not support a right of homestead in a cotenant has been held in Massachusetts, California, Minnesota, Wisconsin, Louisiana and Michigan The reasons given for the latter view are ~~[illegible]~~ and want of power to ~~[illegible]~~ such interest; and absence of statutory power so to do being conferred on the Court

The first section of the exemption act provides the householder is entitled to the farm or lot, &c. owned or possessed and occupied as a residence. Whatever interest is so owned or possessed, in order to constitute the homestead it must be of some specific portion capable of being set apart by metes and bounds, that it may be separated from that which is not exempt. The statute provides that the homestead may be set off in the method there

devised, but it would be impossible to apply any of the methods ~~provided~~ adopted by the statute to an estate in common. The tenant in common owns nothing severally, and no part could be set off to him which did not belong equally to his cotenants. If the legislature intended to include tenants in common as being entitled to a homestead in lands so held, they would have provided a method of setting off the same. By the first section of the act "the homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution and from the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided." While these terms certainly embrace and include all rights attaching to homesteads, the statute is silent as to the

homestead right attaching to lands held in common by two or more tenants. Being silent in this respect, those statutes which hold that an estate in common will support a right of homestead in one of the cotenants must necessarily add to the statute, and take from it. It cannot be done from the laws of conveyance, for if it cannot be partitioned the cotenant may have it sold. That would be a violation of the spirit and words of the act, and would take away one of the rights and qualities of a homestead. If it should be sought to set off the cotenants interests in the manner prescribed by the statute, the homestead so set off might be at once defeated by the cotenant having partition made, or sold sale, if it cannot be divided. It renders necessary the

addition of words to the statute which ~~provides~~ gives a homestead in the farm or lot owned or possessed and occupied as a residence. If a farm or lot is owned by the householder, no one else has an interest therein. If not as now then the homesteads cannot attach. If the legislature has made no provision for a case of this character, and it is not our province to do so. If hardships arise, they may be remedied by legislation which shall meet all the exigencies of such cases. The only interpretation which can be given this statute is to limit it to cases of actual ownership or possession. ~~The judgments of the appellate courts of cook County reversed and the cause remanded~~

~~AFF~~

In the case of Fowler v Halyard
43 Ill 380 a similar question
was before this court and the
case was decided sustaining
the right of homestead, because
there had been a parol par-
tition followed by an actual
possession. The reasoning in
that case sustains what we
have here written.

Demurrer of Phillips C. J.

1393

FILED

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A. D. CADWALLADER

CLERK S.C.