

12131

No. _____

Supreme Court of Illinois

Tyson, et al

vs.

TH
Posth~~wa~~waite, et al

In the Supreme Court
William Tyson et al
Plffs in error

vs
James Posthwaite et al
Defts in error

June 9. 1853

Error to Term

The Plffs in error respectfully
ask this court for a rehearing & review of
this cause decided on the last day of
the last term of this court

The decision of this case is put
by the court distinctly and entirely upon
the ground that the act of 1845. Chapter
34. S.S. 15. &c. was passed under a mis-
-apprehension of the rights of Widows already
secured under existing laws, and with
the intention of conferring more rights
than were supposed already to exist. And
therefore the old law remains unaffected
by the new and according to its provisions
the rights of the parties must be enforced
pp. 739. & 740.

When the court turns to the Record
in this case. & to the written argument of
Mr. Fuller (which is justice to myself
I must say I never read. & wish the
court now distinctly to understand, that
all his statements of facts outside of what
appear by the Record need essential modi-
fications. Changing them materially
before I can admit them to be true) they
will see that in this court below and in
this court. the whole case was made by

the parties to turn upon the fact of
election - And that when this court
decided the case upon the ground
that no election at all was necessary
they decided upon a ground upon
which we had not been heard and
practically decided without giving
us an opportunity to be heard.

I state the course of the argu-
ment upon from recollection as the
briefs furnished the court I cannot find

Then are there in the Opinion of the
court two states of facts given for this construc-
tion of the Revised Statutes, assumed by this court
to exist, upon what I shall contend is sufficient
grounds - They are 1st Misapprehension of the
Legislation of the old Law. and 2^d The inten-
tions of the Legislature in passing the new

Misapprehension of a law means
understanding that law different from what
it really is or means - Upon what grounds is
this law open to Misapprehension - This court
says explicitly: "it is too plain to admit require
the least discussion" - Can this court presume
misapprehension from a law that is so plain
in itself - If they do not presume it from the
old law itself, then it must be from something
in the new Law itself or in the acts & doings
of the Legislature while passing it - This latter
alternative they have not assigned as a reason
& I know of no source from which it could be
obtained in such reliable form as that courts
of justice should weigh it in construing acts

But misapprehension in any event & in the point of view upon which this Statute is under construction could only happen upon this did the Statute give the Widow both dower & inheritance, or did it give her dower & not inheritance or inheritance & not dower. How could the legislature misapprehend a question of ~~inheritance~~ ~~election~~ when it is not in the Statute. It was not then to think of, and could only have been suggested to them by the laws of other States - which invariably so far as my researches have enabled me to find out ~~there~~ is an election provided for in this class of cases.

It is certainly carrying presumptions a great way, when from a Statute so plain as to its positive provisions misapprehensions are said to exist about a thing that is not in it. - I can draw no other conclusion from the language on page 733 - but that the right to elect, and time & manner were misapprehended by the legislature, -

But admit that the legislature so understood the law, and so understanding it passed the law in question, and in the language of this Court p 733 - "This provision was inserted authorising her to determine, which she would take, after she was enabled to determine, upon the settlement of the estate, which was most valuable to her" - is it for this Court to speculate as to what the legislature would have done, had they understood the former law as this Court does? The legislature suppose certain rights to exist - It is for them to say whether those rights shall continue or be

modified. If they pass a law positive in its terms, directing the manner in which those rights shall thereafter be exercised, and at the same time in our part of the statute repealing the old law & re-making it, in a thus modified form in another - is this court construing laws or making laws when they say the old that was repealed shall prevail & not the new.

This court does not pretend but what this law is plain and direct in its provisions. It is not necessary in construing it and giving it effect to raise any thing by way of implication - Is there a case cited by the court that, that was not attempted, and attempted in the English cases in regard to the rights of the King, than which nothing is more jealously guarded - & in the case in Seammon the liberty of a down-trodden race, and the common rights due to all mankind requiring just such a decision. And shall authorities so far removed from our times, or so little applicable in point of facts be used & cited by this court as governing it in the construction of Statutes leaving them to set aside what is admitted to be positive provisions of law upon the face of the act itself.

Again it is said p. 732 "The manifest object of this law was to extend the rights of the widow, & not to curtail them, which would be the case. Should this be held to repeal the former law, and to contract them within the limits ~~there~~ here (given there) prescribed how then does the court get this object of the law which is so manifest - Not from

the whole law. because they say it would
"contract them" Then where? From a
single clause, isolated, taken by itself
and divorced from its context. and which
can be supplied by no other phrase and
is the very phrase and the only phrase
that can be used in its connection - The
court says the legislature designed extending
the rights because a phrase is used, giving
her an election between two things when
she might claim both or one or the
other. As the legislature apprehended
the law to be. Now if I understand
the import & effect of language used in
such a case - that is well I in doubt
from the terms made use of by a giver
of presents to me, whether the intention
be to give me both or one or the other of two
things from the language made use of
in conferring. & if on further application
to him he should say "I repeat the
old act of gift and ^{you shall have} I ^{but} don't say you "may"
if you "elect" have in lieu of ~~the other~~ ^{the other}
13" my idea would be that he designed
to limit & curtail & not to extend my
right

Again p. 733. "In this statute there
is no repealing clause, nor any expression
manifesting any design to repeal or limit
any former law, and we ought not in such
a case to hold that there was a repeal by impli-
cation" The court here has obviously over-
looked a section of the Revised Statutes. by a
clause of which page 458. "an act for the
speedy assignment of towns & partition of
real estate approved Feby 6. 1827" and page
464. "an act relative to Wills & testaments

executors & administrators and the settle-
ment of estates approved January 23^d 1829.
~~was repealed~~ - and by section 138. p. 473 -
rights accrued thereunder were saved -

The legislature undertook the task
of revising the laws of this State. They did
so in our debt, for all the Revised Statutes
were approved March 3^d 1845. & took
effect Sept. 10. 1845. They modified, trans-
posed and essentially altered many of the
laws, and our nation, more than many
others that are urged, prevailed upon them
to do it, that the law was in many respects
uncertain & open to Misapprehension.
Now in no chapter in that book is there
so great & so many alterations of the old
law as in chapter concerning Dower.

Now here is a law open to Misap-
prehension by every body. for this court
must concede that, when they say that
the collective wisdom of the State of Illinois
in her legislative halls misapprehended it
and surely our humble practitioners of the
law in the little county of Boone such
as Altemia Thell that the rays of legal
light emanating from the halls of the
legislature at Springfield did not penetrate
them until a year & more from their
first transmission may be pardoned for falling
into the same error. for at the time of writing
my letter for Mrs. Tyson I gave my opinion
from the old law. I say, here is a law
open to misapprehension, the legislature set
to work to make it certain - They repeal
the old law saving rights accrued under it
and pass a new law which would contract

the old one if allowed to operate, and yet this court says there is no expression manifesting any design to repeal or limit any former law - and give that as a reason why the old law is still in force.

Again the court in citing a quotation from 1 Scammon pp 260. 261 - leave out of it the reason for the rule of construction then adopted by the court - upon the grounds of mistaken supposition & intention - I will give it - "It is true that the words used in the proviso That the children hereafter born of such persons Negroes or mulattoes shall become free, the males at the age of 21. & the females at the age 18 years" may be considered as referring to the registered Negroes and mulattoes named in the antecedent sentence of the paragraph, but when it is remembered that a proviso is introduced to qualify what is affirmed in the body of an act section or paragraph preceding it, we discover that &c.

It will also be seen on examining that case that that section of the constitution, referred to prior existing ^{laws} for its application to its subject matter - ~~that~~ ^{also} that a clause in that ~~state~~ section providing for the registration in the clerk's office of the child born of indentured parents and saying nothing of the other was overlooked by that court in its decision.

Now the reason of the conclusion of the court was that the proviso was introduced to qualify but could not create

Does any part of this law come in by way of proviso. No it is in a section by itself etc 15-

Does it refer to any other law as qualifying that? No, the whole chapter is perfect & complete in & of itself -

Is then a repeal of the old law - clear & unequivocal

(I may remark here that our revised Statute would have been a singular book if after having a general ^{chapter} ~~title~~ to repeal prior acts every time an old law was changed an express repeal or an allusion to the fact of such alteration ~~there~~ should have been made)

Can it then be said that a decision holding that a section of the constitution referring itself to another law for its application, & restricting that application by a proviso, could by that proviso only limit that law and could not be considered as "creating the liability to service, and enrolling a class of persons irrevocably free at their little the subjects of a laborious and extended period of service," ~~to~~ is a rule of any force or efficacy whatever in this case when the legislature repeals the ^{old} law and pass a new one in its place with no reference to any other act whatever -

Again p. 737- "In construing a statute we must consider the mischief designed to be redressed and the remedy intended to be given and should so construe it as to redress the mischief and to advance the remedy, and not so as to increase the mischief and retard the remedy"

What mischief was there that needed a remedy - Was any body injured by the law as it ~~then~~ stood before? If so who showed it the widow? Why she had one thing

for life any how. & one half after payment
of debts in full - making during her life
give sixths of the whole - yet she is injured!
poor woman, then give her the whole -
where the rest of the heirs of the husband
from whom the property descends and to
whom blood the natural feelings of humanity
would suggest it ought to go, except suf-
ficient to support the widow during her
life having reference to the whole commonly
called down - yet but one sixth, if any
body labouring under a sympathy for
widows thinks that is too much and
needs a remedy the fraction that would be
left after any sensible deduction is so
small that the remedy to be advanced must
be to give the widow the whole.

There is not a state in the world
where widows are as well provided for as in
this state. The legislature and courts of
law seem to vie with each other in protec-
ting their rights & giving them property
out of their husbands estates even at the
expense of persons having much better &
higher equities - I am willing that
reasonable provisions should be made
for them but I am not their cham-
pion & will not run a tilt against
a plain & positive provision of the law
& overturn it to advance their rights
and interests.

Again p. 737. "In the opinion of the
legislature the rights of the widows were too
restricted, and that it was just and proper
in such cases that thereafter the rights of the
widow should be so extended as to allow her
to take instead of her dower the one half

of the real estate of which her husband
did sign and which should remain after
the payment of debts, and that she should
have a reasonable time after the settlement
of the estate to make such election -

Now this is given by this court as
their ^{the legislature} understanding of the old law. & the
mischief to be redressed and their object
in passing the new law. The remedy to
be advanced - Will they carry their object
into effect by Char. law. What then - Oh
the legislature did not know what the old
law was. Will if they did not is this
court on that ground to set aside positive
law. if so when will they stop what law
is safe. Any time that this court assumes
the fact that the legislature ~~misapprehends~~
~~misapprehends~~ misapprehends a law, too Char
to require discussion, they will upset
a positive law and hold the old law
of the true construction of which the court
itself assumes they ^{the legislature} are not aware of
to be the law of the land - Can any
rule of construing statutes be better devised
to render courts of law to block all ~~law~~
~~for the reformation~~ ~~the law~~ attempts
by the legislature to reform our laws
and to advance such remedies & repress
such mischiefs as the legislature them
selves upon such lights & intelligence
as they have have a right to indicate
beyond any control by this court -

most is said, or the one having most affinity to the title, or how is the question to be decided, it is apparent at once that in ^{such} cases the rule is inapplicable - Again the chapters cannot conflict unless they legislate upon the subject matter out of which the controversy grows, then if the controversy grows out of the subject matter of both chapters which shall govern. But passing this - what is the subject matter of this ~~statute~~ chapter ~~so~~ entitled the ~~several~~? It is the rights of widows in the real estate which their husbands died seized or were seized in fee during Coverture - It is not down above as suggested by this court, but the statute governs the whole question as stated above the only other chapter that does in any way affect it is ~~the~~ ^{or} legislate on the same subject matter is that entitled wills the subject matter of which is ~~this~~ the disposition of the estates of deceased persons generally.

Now one statute is general ~~the~~ other is particular upon the whole matter the other is particular on a part of the whole the rule of the legislature is therefore inapplicable and the other rule must be adopted and govern and that is that a part of one statute general in its terms shall be controlled & governed by another that conflicts with it and is particular in its terms on the same subject matter -

But the court says that no allusion is made to the personal property - of course there is not. The legislature was providing for the disposition of real estate and not personal property, and as nothing is said here it goes as provided in the statute of wills -

I pass from the more high and substantial grounds taken by the court to others minor in their character & yet having their bearing in deciding this cause - and for the purpose of getting at them and giving them the proper weight. It is necessary to take it for granted that the chapter 34. does not controls - And here I may remark that perspicuity in language and minuteness in detail is not to be expected from an Illinois legislature and if they are wanting in this Statute, that should not affect its plain & obvious provisions - And I cannot express them better than in the language of this court already quoted from page 733 -

Then to carry into effect these provisions and to answer the questions propounded by the members of this court in this opinion - and beginning with the last one and so in their reverse order I say the widow will sue the heirs by summons if in the state bringing them into court by service if not or cannot be found by advertisement by bill in chancery for partition, or suit of partition if at common law. in the circuit court of the county of Boone, where the lands are situated. and upon proving the facts that entitle her to claim to wit coverture death seized in husband in fee at death. and who are the other heirs, and claiming in fee one half of the lands after payment of debts and relinquishing her dower estate in favor of the heirs - she will be entitled to a commission setting apart the lands one half to her & the other to the other heirs, and when the report is confirmed by the court in the language of

ac 25. p 202 "the estate shall be vested in her absolutely in fee simple & of inheritance forever subject to her absolute use & control"

And then and not until then has she an estate that can go to her heirs compare this Statute. with sect 10. p. 267. R.S. & the construction of that act 11 Stat. 642 "Neither guardian or the court could convey to vest the title in any other mode than that provided by the Statute"

This is a statutory estate, she acquires property upon complying with certain conditions, shall it be said that this court takes property from one ~~set~~ class of heirs and gives it to another, without that other class bringing themselves within the Statute our laws have said in so many words almost make your election, & vest your title by proper legal proceedings & then it is yours to transmit.

A strong argument is drawn from the very fact that in every other case in which election is required ~~by~~ to be made by widows the time and the manner is expressly given - within which & by which it is to be done and the making the election vests the estate - It is not vested after litigation but so instanti - In this case it says make an election and then make that election even for your heirs by legal proceedings, if you cannot get it without -

There are good reasons for this It is of importance to the State for its good order & well being, that the title to real estate be at all times surely settled in some owner. Now in this very case suppose

a man commits a trespass on these lands
by mistake or otherwise and is desirous
of making reparation, to whom shall he
apply, the land is vacant & unoccupied
if he pays it to the agent as he well might
do for aught there is on the records of his
county or any where else accessible to him
the heirs of the widow can make him
pay them over again their share -

Or supposing that he buys this land
from the agent of the heir or the heir himself
what is there to advise him, that this court
would hold that a letter sent by mail, not
in the proper handwriting of the party, without
a witness subscribed or an acknowledgment
was received by the person to whom it was
sent in England was evidence of an election
& vest a fee in the widow - Is not this
"contriving to vest the fee title in" some other
more than that provided by the Statute"

Can a rule be better devised to encourage
the ~~purging~~ perpetration of perjury than this -
The Widow elects not at all - The heirs upon
her death can claim nothing unless that
she elects to take by inheritance, and to prove
it can just as well prove it in pais by
word of mouth as by writing not under seal
and ~~not~~ will if they are corrupt do so
beyond possibility of disproof

The rule is absurd in its results
While she lives if her election is denied she
can easily satisfy them by filing her
petition for assignment & obtaining it
when she dies the rule takes from the heirs
of the husband his property to give it to

Strangers -

until she does make an election
when is the title it is somewhere can it
be elsewhere than in the heirs - now
how is it to be divided the Statute points
out the mode & the only mode

The court says they can see no
necessity for formal proceedings at law
can they see it for none and if so why?
Is it not because the law expressly requires
when the heirs divide cannot agree -

Now in conclusion of the whole
matter I ask a rehearing in justice to
my Client I ask this court to carefully
weigh the exceptions I have taken to the
grounds of their decision & especially to the
fact that if the legislature did misap-
prehend the law as it stood before this
court has as clearly misapprehended
the law as it now stands when they
said that the legislature passed no
law repealing the old law

& I humbly submit myself to the
judgment of the court

W. J. Purdy

Att. Gen.

75-
Sup. Court

Tyson et al.

vs

Postthwaite et al.

Petition for
a rehearing

75

Filed June 20. 1858.
Melrose Cld.

W. J. Burroughs
Att. Gen.

In the Illinois Supreme Court.

Of June Term, 1853.

William Dyson and wife
vs.
James Postlethwaite and others.

Error to Boone.

To the Honorable the Justices of the
Supreme Court of the State of Illinois.

The undersigned respectfully states, that he was one of the counsel of the above named plaintiffs in error at the hearing of the above intitled cause, at the last term of this court; and that in his opinion a rehearing in the said cause would tend to justice between the parties thereto; and that the said plaintiffs are intitled to such rehearing therein upon the following grounds:

1. The court assumed as a fact that the letter of William I. Burgess, given in evidence in the said cause, had been sent to the above named William Dyson; whereas the said letter was not so sent, as appears by the evidence.

2. The plaintiffs in error were in effect and reality condemned unheard, by reason that the court decided the said cause upon grounds not suggested or referred to by the counsel of the defendants, and which the counsel of the said plaintiffs therefore had no opportunity to controvert; and this petitioner is of opinion that if counsel had been heard upon the point on which the said decision turned, the court would have taken a different view of the said cause, and would have decided it differently.

3. The court in their said decision assume that the former statute of wills of 1829, containing the only statutory provision respecting the rights of widows to the lands of their deceased husbands, previous to the enactment of the Revised Statutes of 1845, was repealed by chapter XXXIV of the Revised Statutes, intitled "Dower," by implication; whereas the said statute of wills is expressly repealed by the said Revised Statutes chapter XC. page 464; and for the greater certainty the General Assembly, by section four of the same chapter, expressly repealed all acts the provisions of which were repugnant to the said Revised Statutes, so that the Revised Statutes in this respect are to be construed in the same manner as if there had been no previous enactment upon the subject.

4. The decision in question, as this petitioner conceives, attributes ignorance and ^{incapacity} ~~incompetency~~ to the legislature, and on that ground defeats their deliberately expressed will, whereas in the cases cited, inadvertence, and not ignorance or incapacity, are attributed, and the enactment is not defeated in any of them, and the enactment itself is not defeated in any of them; but only an operation arising indirectly and inferentially from the enactment is denied, and that operation was the repeal of a statute by implication, which is not favored, and that implication was ~~from~~ of a negative supposed to be implied from a positive enactment, such positive enactment not interfering with the operation of the statute supposed to be repealed. See *Dunsmuir on Statute*, 639.

5. The decision complained of, as this petitioner believes, is a precedent of unconstitutional and dangerous ~~and~~ disorganising tendency. The legislature is the highest constituted power in the state, the organ through which the sovereign power, which resides in the people, more immediately expresses its will, while it is the appropriate function of the judiciary to direct the application of that will when expressed, to particular cases. If this court disregard a legislative enactment on the ground that the legislature are ignorant and incompetent, the same thing will be done by the circuit

courts, by justices of the peace, and all inferior jurisdictions, and by individuals; and the powers of government will so far cease and become negative,

b. The court was divided in the decision complained of, and that decision carrying the disregard of a statutory enactment farther than it was ever carried before, and in a new direction, as this petitioner conceives, it is desirable not only that the court should be unanimous, in making it, but should also have the assistance of the views and precedents and suggestions which may be presented by counsel.

And this petitioner further states, that he was not in attendance in this court at the last June term thereof, at the time when the said decision was made, ~~and~~ afterwards, and was not informed thereof until after the close of the said term, so that he had no opportunity to petition for a rehearing in the said cause at that term.

This petitioner therefore respectfully prays that the said cause may be heard.

Francis Brunnah.

Supreme Court.

William Tyson and wife

vs,
James Postlethwaite and
others.

Petition for Rehearing.

Filed July 11, 1853.

L. Leland Clk.

By P. K. Leland Dep.

Brown.

In the Supreme Court
Isaac Tyson our

Opp in error

vs

James Posthumate et al

Defts in error

Error from
Prone

Said defendants are hereby
notified that at the June Term of said
court 1853. a Petition for a rehearing
will be filed in this cause
Dated June 1. 1853—

(W. J. Burroughs
Opps Atty

Admit due service on me of a notice
of which the above is a copy
Done 29. 1853

A. C. Huller
Atty

[1853-13]

Sent Petition to W. T. Burgess
& he is to return it Sept. 9. 1853—

Supreme Court

Isaac Tyson vs

vs

James Posthuma

et al

Notice of Petition for

Reframing -

Filed June 30th 1853.

L. Leland clk.

By P. H. Leland Depy.

Supreme Court.

William Tyson and wife

vs,

James Postlethwaite and others.

June Term, 1853.

Take notice that a petition for a rehearing in the above intitled cause has been filed by the undersigned, counsel for the plaintiffs in error in the same, and that the undersigned will apply for a rehearing upon the same at the first opportunity. Dated 12 July 1853.

Yours &c.

Do Jason Marsh, Esq.

Counsel for Defts. }

Francis Burnap;

State of Illinois. }

La Salle County, ss. }

Francis Burnap, the above named petitioner, maketh solemn affirmation and saith that he did in the morning of the thirteenth day of July instant, deliver to Jason Marsh Esq. who argued the above intitled cause at the last term of this court, as counsel for the defendants therein, a notice of which the foregoing is a true copy.

Francis Burnap.

Affirmed at Ottawa, in the county of La Salle, this
13th day of July, 1853.

[19131-12]

Lindley W. Curtis, Clerk
for Court

Supreme Court.
William Dyson and wife
vs
James Pottlethwaite and
others.

Notice.

Filed July 18th 1853.
L. Liland Clk.
By P. H. Liland Dep.

Barnes

75

William Tyndal & Co.

James Postlethwaite & Co.

75

1853

12/31