

13429

No. _____

Supreme Court of Illinois

McCormick et al

vs.

Wilcox

71641  7

Supreme Court, Second Grand Division.

JANUARY TERM, 1861.

Thomas McCormick, Harriet B. McCormick and Benjamin Clark.

^{vs}
Horace H. Wilcox.

} Error to Hancock.

1 On 23rd. January, 1859, said Wilcox filed in the Hancock Circuit Court, a bill in Chan-
2 cery, stating, that on the 16th. day of June, 1856, Thomas McCormick executed two prom-
issory notes of that date to Daniel A. Burr payable, one on 22nd May, 1857, for \$400, the
other payable 22nd. May, 1858, for \$500, both at 6 per. cent interest.

3 On 25th June, 1857, when only \$257.00 of said note had been paid, said note was endorsed
to Wilcox. On 16th. June, 1856, said Thomas McCormick and Harriet B. his wife, mort-
4 gaged to said Burr the S. E. 28 in town 7, north six west of 4th. principal meridian, in Han-
5 cock County, to secure the payment of said notes. Bill alleges that said notes have not
6 been paid, except \$257 on one note paid on 18th. Feb., 1857, and asks for foreclosure of
7 mortgage. That on 19th. Aug., 1858, said McCormick and wife conveyed said premises
by deed to Francis M. Corby, which was duly recorded on 21st. Aug., 1858. Bill alleges
8 that "one Benjamin Clark also claims some interest in, and to the said land, but the nature
of the title on interest claimed by said Clark, in said land is unknown to your orator, but
your orator alleges that the said claim of said Clark, whether real or pretended, is not held
or derived by under or through said Thomas McCormick and Harriet B. McCormick, his
wife, nor by, through or under them or either of them, or if so any title claimed or interest
which he the said Clark has in and to said land is subject to the rights of your orator under
and by virtue of said mortgage assigned to them as heretofore set forth." "Your orator
8 further represents to your honor, sheweth that the said Thomas McCormick and Harriet B.
McCormick, his wife, reside upon and are using said land in the ordinary use and manner
required for farming purposes." Bill then alleges that said notes have not been paid by
either Corby or Clark, and asks a foreclosure.

6 Bill makes Thomas McCormick and Harriet B. McCormick his wife, Francis M. Corby
and Benjamin Clark parties defendant, pays process &c., and waives answer under oath and
prays for a decree of foreclosure and sale of said premises as against all the said defendants.

10 Copies of said notes are exhibited with said bill, and also a copy of said mortgage.

12 Said mortgage is acknowledged as follows :

STATE OF ILLINOIS,
Hancock County. } ss

Be it remembered, that on this sixteenth day of June, in the year of our Lord one thous-
and eight hundred and fifty six, Thomas McCormick and Harriet B. McCormick who are
personally known to the undersigned, a Justice of the Peace of the said County to be the
identical persons who executed, and whose names are subscribed to the foregoing deed of
conveyance as having executed the same, came before me and acknowledged the same to
be their voluntary act, and deed for the proposes therein expressed. And the said Harriet
B. McCormick, wife of Thomas McCormick, being by me made acquainted with the con-
12 tents of said deed of conveyance, and examined separate and apart from her said husband.
acknowledged that she executed the same, and relinquished her dower in the premises therein
mentioned voluntarily, freely and without the compulsion of her said husband, and that she
does not wish to retract the same.

In testimony whereof, I have hereunto set my hand and seal, at my office at Durham
County, and State aforesaid, the day and year first above written.

JESSE DUFFIELD, J. P. (Seal.)

14 17 There is also exhibited with said bill a deed from said McCormick and wife to F. M. Corby
15 16 inclusive for said premises.

18 A summons was issued on this bill, dated 23rd. Feb., 1859, directed to the Sheriff of
Hancock county, who returned the same served on Corby and Clark, on 23rd. Feb., 1859,
and Thomas and Harriet B. McCormick on 25th. Feb., 1859.

18 Said summons was returnable to term of Hancock Circuit Court, to be held on 1st. Mon-
day in March, 1859.

19 On 10th. March, 1859, a decree has entered by Sibley Judge in favor of said Wilcox against
20 defendants McCormick and wife and Corby and Clark, for want of answer, the bill has taken
as confessed and it was thereby ordered that defendant Thomas McCormick, on or before
1st. June, 1859, pay complaint \$760.67 and interests with costs, and if he fail to pay that,
the equity of redemption of defendants, McCormick and his wife and Corby and Clark be
foreclosed and that the master shall sell the same and give a certificate of redemption to the
purchaser and report his proceedings.

4 Sil. \$19
5 2 336

On 12th. March, 1859, defendants Corby and Clark moved the court to set aside said decree which motion was overruled.

22 On 12th. Oct., 1859, the master reported a sale of said premises, under said decree to
25 same Horace H. Wilcox for \$816.70 and executed a certificate of purchase, the sale has
approved at same term.

25 Thomas McCormick, Harriet McCormick and Benjamin Clark bring the case by writ of
error to this court.

ERRORS ASSIGNED.

1 In rendering decree in favor of complainant the record showing no cause of action in him.
2 In rendering decree without having made Burr the mortgagee a party either complainant
or defendant.

3 In rendering a decree of foreclosure against any of defendants, the bill alleging that
premises were homestead of McCormick and wife, and there being no sufficient release by
McCormick and wife, of their rights to such homestead.

4 and 5 are substantially the same as 3rd.

6 Rendering decree against Clark without sufficient ground of relief in bill against him.
The 7, 8, 9 and 10 assignments, are in substance, the same as the preceeding.

Brief of Points for Plaintiffs in Error.

The notes and mortgage were originally given to one Daniel A. Burr, and that the right
of action both legal and equitable, was originally in him. The bill alleges that Burr assigned
the notes to complainant, but does not allege that the mortgage was assigned. The assign-
ment of the notes passed the right in equity to foreclose the mortgage in the name of the
holder of the notes, but it was necessary as the mortgage was not assigned to make the original
mortgagee a party to the suit.

If he was not made a party complainant, he was a necessary party defendant. Story's
Equity Pleading, Sec. 153. Spences Equitable Jurisdiction, vol. 2 p 694. A foreclosure
and sale of the mortgaged premises, manifestly deprives Burr of his interest in said premises,
as mortgagee. He is therefore a necessary party. The objection that he has not
been made a party may be made at any time.

Harrington vs. Hubbard, 1 Scam. 573. Spear vs. Campbell et. als. 4 Scam. 427.

The bill on its face alleges that the mortgaged premises was the homestead of defend-
ants, Thomas McCormick, and Harriet his wife. See Record, page 8. The mortgage,
neither in the body of it, nor in the acknowledgement contains any release of
homestead rights. This case is virtually decided by Kitchell vs. Burgwin and wife, 21, Ill.
40. Vanzant vs. Vanzant, 23 Ill., 540.

The bill on its face shows no ground for any relief against Plaintiff in error, Clark. It
does not allege that he has any connection with the mortgaged premises such as would
entitle defendant in error to a foreclosure against him. See Record, p 8.

WILLIAMS GRIMSHAW and } Att'ys. for Plaintiffs in error.
WILLIAMS,

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McCormick

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Wilex

Abstract & brief

Filed June 18-1901

L. Ireland

Clark

13429

Filed Jan 11-07
Wm. C. Curry
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