Depew, Nancy S vs Robards, Archibald S. 1852 Marion Co 305/13

557/33

Scott affirmed
as Preston, Frederick married Bowen, Mary C 1847 Oct in Delovan Misc.
as Dunn, James married Depew, Nancy 1848 Nov in IC

piano sold to Robards

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Third Judicial Circuit — in said State, GREETING:

Whereas, In the record and proceedings in a certain cause lately pending in the Circuit Court within and for the County of Marion, in said State, and in said Judicial Circuit — wherein Nancy S. Defew was plaintiff and Archibald S. Robards was defendant —

in an ~~action of~~ Civil action — manifest error hath intervened, to the great damage of the said plaintiff, as by her complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of ~~Jefferson~~ St. Louis, in the county of ~~Cole~~ St. Louis, in said State, on the Third Monday in October — next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, ~~HAMPTON L. BOON~~ William V. Glanville, Clerk of our said Supreme Court, at office, in the City of ~~Jefferson~~ St. Louis, the Twenty Fourth day of August, in the year of our Lord one thousand eight hundred and ~~forty~~ fifty two.

Wm. V. Glanville
Clerk

State of Missouri
County of Marion } Office Clerk Marion Circuit Court

The service of the within writ appears by the transcript of the record and proceedings in the within cause hereto annexed.

Witness Thomas E Thompson Clerk of said Court and the seal thereof Done at office at Palmyra in the County aforesaid this the 16 Sept 1852

Thos E Thompson Clk

GENEALOGICAL SOCIETY MASS.

1 Nancy S. Depew vs Archibald S. Robards

State of Missouri
County of Marion ss In the Marion Circuit Court:

Be it remembered that heretofore to wit on the 19th day of August A.D. 1851. there was filed in the office of the Clerk of the Circuit Court within and for said County of Marion, a transcript of the record and proceedings had in the above entitled cause in the Hannibal Court of Common Pleas in the words and figures following to wit:

Transcript filed State of Missouri } In the Hannibal Court of
County of Marion ss } Common Pleas

Be it remembered that heretofore, to wit: on the twenty second day of March in the year of our Lord one thousand eight hundred and fifty, there was filed in the office of the clerk of the Hannibal Court of Common Pleas at Hannibal in the county of Marion in the State of Missouri, a certain petition which reads as follows, to wit;

Petition Nancy S. Depew, plaintiff } In the Hannibal court of Common
vs } Pleas - In the city of Hannibal,
Archibald S. Robards deft; } County of Marion, in the State of Missouri

Nancy S. Depew plaintiff states that the defendant Archibald S. Robards has in his possession the following personal property, to wit:- One Mahogany cross barred Piano with rose-wood front, one Mahogany Piano Stool Octagon shape, and one blue cloth Piano cover all of which said articles are worth the sum of three hundred & fifteen dollars - and belong to the said plaintiff - and said plaintiff has demanded of said defendant the said property and he refuses to deliver the same to the said pltff - whereupon said plaintiff says that said defendant owes her the sum of three hundred & fifteen dollars, the value of said property - and said plaintiff asks judgment for said sum of three hundred & fifteen

2 dollars due her for said property

Nancy S. Depew
by her Attorney
Thos L. Anderson

Richard J. Depew makes oath & says that he believes the above petition, and the matters therein as stated are true

Subscribed & sworn to before me this 22nd day of March 1850 } Richard J. Depew
C. D. Bourne clk

And thereupon afterwards, to wit, on the said twenty second day of March in the year of our Lord one thousand eight hundred and fifty one, there was issued from the office of the clerk aforesaid, a writ of summons, which reads as follows, to wit:

Summons State of Missouri }
County of Marion ss } The State of Missouri

To the Sheriff of Marion County, Greeting:

We command you to summon Archibald S. Robards, that he be and appear in the Hannibal Court of Common Pleas at the Court house in the city of Hannibal, in the said County of Marion on the first Monday in June next, then and there in our said Court, and before the Judge thereof, to answer Nancy S. Depew in a civil action, as set forth in a certain Petition, of which the annexed foregoing writing is a copy; and this you shall in no wise omit, and have you then there this writ,

(L S) Witness my hand as clerk of said Court, and the seal thereof, Done at Hannibal in said County, the 22nd day of March A.D. 1850

Charles D. Bourne clerk

On the back of said writ appears the following Endorsement, to wit:

Service of writ Executed this writ and petition by leaving a true copy of the same at the usual place of abode of the within named A. S. Robards, done in Marion County Missouri, this 11th day of May A.D. 1850

B B King, Sheriff of Marion County, Missouri

OWENSBURG ... So Lee MASS

By D. F. Jackson Deputy

And afterwards to wit, on the third day of June one thousand eight hundred and fifty, it being during the June term A.D. 1850, of the Hannibal Court of Common Pleas continued and held at the court house in the city of Hannibal, County of Marion, and State of Missouri, before the Hon Thomas Vanswearingen, Judge of said court, the following proceedings were had, to wit

Answer filed

Nancy S. Depew
vs
Archibald S. Robards } at this day comes the defendant by his attorneys, and files his answer to the plaintiff's declaration herein—

Which said answer reads as follows, to wit;

Answer

Archibald S. Robards Deft
ats
Nancy S. Depew plff } Hanl. Ct. Com: Pleas June Term 1850

Defendant Archibald S. Robards, admits that he has in his possession certain property as described in plaintiffs petition, to wit; One Mahogany Piano - one Mahogany Piano stool, and one blue cloth Piano Cover; but defendant denies that the said property or any part thereof belongs to plaintiff, defendant avers that the said property belongs to him having been purchased by him in good faith, and for a Valuable consideration — Defendant denies that the Value of said property is three hundred & fifteen dollars

Archibald S. Robards
By Harrison & Hawkins &
Wm M. Cooke - his Atty.

Wm P. Owsley agent for defendant makes oath and says that he believes the above answer, and the matters therein as stated are true

W. P. Owsley

Sworn to & subscribed before me May 7. 1850
C. D Bourne clk

And afterwards to wit on the day and year last aforesaid it being during the term last aforesaid of said Court. continued and held at the place and time and before the Judge aforesaid, the following proceedings were had, to wit:

Motion for new bond for Cost.

Nancy S. Depew }
vs }
A. S. Robards } At this day comes the defendant by his attorney, and moves the court. to rule the plaintiff to file a new bond for the costs of this suit.

Which said motion filed by the defendant, reads as follows, to wit:

Motion

Depew } Hancock Court Com: Pleas June Term 1850
vs } Defendant by his attorney moves the court to
Robards } require the plaintiff to file a new bond in this case. — 1st Because Thomas J. Ayres the security in said bond is insolvent — 2nd for other reasons, Harmon & Warden for defts

And afterwards to wit, on the fifth day of June in the year last aforesaid, it being during the continuance of the term last aforesaid of said court, continued and held at the place and time, and before the Judge last aforesaid, the following proceedings were had, to wit:

Judgment on motion

Nancy S. Depew }
vs } At this day come the parties by counsel
Arch: S. Robards } and the defendants motion, to rule plaintiff to file a new bond for costs, being argued the said motion, is now here by the court sustained; and thereupon it is ordered that the said plaintiff file a new bond herein, with security for the costs of this suit, on or before the first day of the next term of this court; to which term it is now here ordered that this cause be continued.

And afterwards, to wit: on the fifth day of November in the year last aforesaid, it being during the November term 1850 of the court aforesaid continued and held at the place and before the Judge aforesaid, the following proceedings were had, to wit:

5

Nancy S. Depew
vs
Archibald S. Robards

Bond filed

At this day come the parties by their attorney, and the plaintiff files an additional bond for costs, and by consent of the parties this cause is continued to the next term of this court.

And afterwards to wit: on the second day of June in the year of our Lord one thousand, eight hundred and fifty one it being during the June term A.D. 1851 of the court aforesaid, continued and held at the place aforesaid, before the Hon: William M. Cooke Judge of said court, the following proceedings were had, to wit:

Order of Change of Venue

Nancy S. Depew
vs
Archibald S. Robards

And at this day come the parties by their attorneys and it appearing that the Judge of this court has been hitherto Engaged as counsel in this suit, therefore it is ordered that the venue of this cause be changed to the Marion Circuit Court, at Palmyra in the State of Missouri, and that the clerk of this court make out a complete transcript of the record and proceedings had here in this court, and transmit the same, together with all the Original papers filed herein and not forming a part of the record, to the clerk of said circuit Court,

State of Missouri, County of Marion }

Certificate to Transcript

Seal

I Charles D Bourne, clerk of the Hannibal, Court of Common Pleas, at the city of Hannibal, in the said county of Marion, do certify that the foregoing pages contain a full and complete transcript of the record and proceedings had in said Court, in the cause therein specified; as the same appears of record and on file in my office. In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at office in Hannibal the 5th day of August A.D. 1851

Ch D Bourne clerk

And afterwards to wit: on the 27th day of November 1851, it being during the November term 1851 of the Marion

Circuit Court. continued and held at the Court House in the town of Palmyra, within and for the county aforesaid, before the Hon: Carty Wells, Judge of said Circuit court, the following among other proceedings, were had, to wit,

Continued

Nancy Depew, pltff
vs
Archibald S. Robards Deft } civil Action,

At this day come the parties by their attornies and thereupon on motion this cause is continued until the next term of this court,

And at another day, to wit: the 13th day of March 1852, during the March term of said Court, 1852, held as aforesaid the following among other proceedings were had, to wit;

Continued

Nancy Depew pltff
vs
Archibald S. Robards Deft

At this day come the parties herein, and by consent this cause is continued until the next term of this court,

And at another day, to wit: the 16th day of August 1852, during the August term of said Court, 1852, held as aforesaid, the following among other proceedings were had to wit;

Judgment

Nancy S. Depew, plaintiff
vs
Archibald S. Robards Defendant } change of Venue from Hannibal

At this day come the parties by their attornies, and neither party requiring a Jury, this cause is submitted to the Court sitting as a Jury, on the issue joined between the parties, whereupon the court having heard the evidence and argument of Counsel, the plaintiff voluntarily suffers a non suit herein, with leave to set the same aside, It is therefore considered by the court, that the defendant do have and recover of the said plaintiff his costs about his defence herein Expended, and that Execution issue therefor,

7

Whereupon the plaintiff by her attorney files her motion to set aside the non suit entered herein, which motion being seen and considered is overruled by the court, to which opinion of the court in overruling the said motion the plaintiff by her attorney Excepts, and files her Bill of Exceptions herein. which being seen by the court, is recieved, signed and sealed, and made a part, of the record in this cause)

Bill of Exceptions

Which said Bill of Exceptions is in the words & figures following, to wit;

Nancy S. Depew plff; vs Archibald S. Robards Deft; } In the Circuit Court of Marion County in the State of Missouri, Aug. Term 1852,

Be it remembered that on the trial of this case the plff: gave evidence tending to prove the following facts to wit:

Statement of Evidence

That the plff: in 1848 was residing with her mother in the State of Indiana, and in the Spring of said year came from Indiana to Fayette in the State of Missouri on a visit to her uncle Uriel Sebree - that she remained there till August of the same year - that while there, she was introduced to a man who called himself, Doctor James L. Dunn - who profeped to have permanenty located himself in the town of Fayette for the practice of Medicine - he was a man of intelligence & plain and unassuming in his manners and represented himself to plff: & the community as being a single man - he was recieved into & moved in the first circle of society at Fayette, - during the stay of plff at her uncle's Uriel Sebree, she was courted by said Dunn, and engaged to marry him - but before she would do so, she returned to her Mothers in the State of Indiana in the month of Aug: 1848 - and in the month of October thereafter the said Dunn came to her mother's in Indiana - and her Mother & friends being pleased with him - on the 8th of Nov: 1848, the said plff: & the said Dunn were married at her mothers house, & remained there till the 17th of Nov: the same month - when they left for

Howard County, Missouri - the said Dunn promising to return with pltff: in the spring, on a visit. - When pltff left her Mother in company with her supposed husband, she took with her a fine Mahogany Piano - cover & stool, worth the sum of 315 dollars, which had been given to her by her Mother - also two beds & bedding, a mahogany work stand and various other articles - also one hundred dollars in cash which was entrusted to said Dunn, - They arrived in the city of St Louis the latter part of Nov: and finding much ice running in the Missouri river - they came by boat to the city of Hannibal on the Mississippi river, and croped over to Fayette by stage leaving the said Piano & other articles at St Louis - The said Dunn after remaining in Fayette a few days, left & went to St Louis, promising to return in a week - on his arrival in St Louis he caused the said Piano, cover & stool, and the other articles belonging to pltff: to be shipped to Hannibal and there he sold the whole of them & left - and has not since been heard of - The deft: bought of said Dunn the Piano, - stool, and cover - Evidence was also given tending to prove that the said Dunn had the year previous, to wit: in 1847, lived in Wisconsin and there called his name Doctor Frederick Preston, - and on the 10th of Oct: of said year 1847, he was married to Miss Mary C. Bowen in the town of Delavan in the State of Wisconsin, and in a few months after their marriage, said Dunn (then said Preston) left his wife in Wisconsin - that said wife was living at the time of said Dunn's marriage to pltff: and is still living - said Dunn never having been divorced from his wife in Wisconsin - It was also proved that the pltff: demanded of said deft: the Piano, Stool & cover, before the institution of this suit, and that deft refused to deliver the same to pltff: - this was all the evidence offered by pltff. -

Testimony of Thos. J. Ayres

The deft: then introduced as a witness, Thos. J. Ayres, who stated - that about two years ago the pltff: & Doctor James L. Dunn came to Hannibal on their way

2

to Fayette - and remained 2 or 3 days waiting for the stage, that while at Hannibal they passed & recognized each other as husband and wife - in the spring afterwards Doctor Dunn came to Hannibal without the pltff, ~~having~~ bringing with him a piano & some other furniture - a portion having been sent to Hannibal some time before, and sold the same he thinks in April, that the pltff was never in Hannibal after the fall 2 years ago - that when said Dunn & pltff. were in Hannibal in the fall as above spoken - the deft. did not know them as he thinks, from the fact that in the spring when the said Dunn desired to sell said property he informed me that he understood the defendant wanted to buy a piano - and asked witness to introduce him to Deft. - He thinks pltff was 25 or 30 years old -

Testimony of Holtzman

The deft: also introduced as a witness Holtzman, who stated, that he has examined the Piano in controversy, that he is a judge of Pianos and their Value - and he thinks that said Piano 2 years ago was not worth more than 175 dolls: - that now it is not worth more than 150 or 175 dollars now

This was all the evidence given either by pltff: or deft:

Instructions asked by plaintiff

The pltff: then asked the court to give the following instructions

Nancy S. Depew pltff } In the circuit court
vs } of Marion County
Archibald S. Robards Deft } Aug: Term 1852

The counsel for the pltff: moves the court to decide the Law of this case, as follows:

1st - that if the pltff: was the owner of the Piano, stool & cover sued for, and one James L. Dunn from whom Deft: claims to have bought the same became possessed thereof only by fraudulently representing himself to pltff: as being an unmarried man, and pltff trusting to such representations married him - and said Dunn at the time of said

Refused

marriage had a wife living, which fact was unknown to plff: - then said Marriage between said plff: & said Dunn was void, and vested in said Dunn no title to plffs: property, nor any right to sell or dispose of the same - and the said plff: is entitled to recover the value thereof -

(Refused)

2nd That if James L Dunn, from whom ~~plff~~ Deft: claims to have purchased the Stool, Piano & cover sued for, only obtained the possession of the same from said plff by a fraudulent & void marriage, such possession did not authorize said Dunn to sell the same - nor did a sale of the same by said Dunn to said deft: vest in him any title to the same.

(Refused)

3rd That if Dunn had a wife living at the time of his marriage with plff: said Marriage with plff: was Void - and if said Dunn had no other title to said property sued for except that derived from a Void Marriage, and said Deft purchased said Piano, Stool, & cover, without knowing of said Marriage - said purchase vested in said Deft: no title and said plff: is entitled to recover of said deft: the value of said property - which instructions the court refused to give - To which decision of the court in refusing said instructions & refusing to decide the law as asked plff - plff excepts.

Instructions given for Def^n

The court gave the following instructions for the deft: — The Court decided the law to be as follows. —

(Given)

If Dunn obtained the possession of the property sued for by virtue of a Void Marriage with the plaintiff, and held the possession of the same as owner by the Consent of the plaintiff, and sold said property to the defendant for a valuable consideration, and defendant purchased said property without notice that Dunns marriage with plaintiff was fraudulent or void, then defendants title is good against the plaintiff —

To the opinion of the court in giving said

instruction. pltff: excepted. —

Nonsuit

Whereupon pltff: took a nonsuit, and then moved the court to set the same aside. as follows. to wit:

Motion to Set aside Nonsuit.

Nancy S. Depew pltff } In the circuit court of
v } Marion County, Missouri,
Archibald S. Robards Deft } Aug: Term 1852

The pltff: moves the court to set aside the non-suit in this case, for the following reasons. Viz:

1st. Because the court decided the Law of this case wrong.

2nd. The instructions asked by the pltff: ought to have been given by the court, and not refused —

3rd. The instructions given by the court for the deft: does not contain the law of the case. and ought to have been refused —

Thos. L. Anderson
Atty: for pltff

which motion was by the court overruled — to which opinion & judgment of the court in overruling said motion the pltff: excepts, — and prays that this his Bill of exceptions may be signed, sealed & made a part of the record, which is accordingly done

Carty Wells (Seal)

Costs

	Plaintiffs		Defendants		Total	
	$	cts	$	cts	$	cts
Charles D. Benson Clk H.C.C.	7	27	1	60	8	87
B. B. King Shff Marion Co	1	80		90	2	70
Thos. E. Thompson Clk	4	45	1	55		
This transcript			4	05	11	05
					$ 22	62

Attest

Wm. E. Thompson Clk

State of Missouri
County of Marion ss. I Thomas E Thompson Clerk of the Circuit Court within and for the County of Marion, Certify that the foregoing pages contain a full, true and complete transcript of the record and proceedings had in said Circuit Court, in relation to the Cause therein mentioned, and of all the original papers filed in said Cause, and properly forming a part of the record thereof, as fully and completely as the same remains of record and on file in my said office. In testimony whereof I have hereunto set my hand and affixed my official seal. Done at office at Palmyra in the State and County aforesaid this the 15 Sept 1852

Thos E Thompson Clk

Index

Transcript from Hannibal Court of Common Pleas filed page 1

Copy of petition . . . . . " 1

Summons issued and service of same . . . " 2

Answer of deft. filed and Copy of Answer . . . 3

Motion for new bond for Costs & Judgment on same . 4

Bond filed . . . . . " 5

Order of Change of Venue & Certificate . . . . " 5

Continuance — to Continuance 6

Judgment on Nonsuit — &c 6

Bill of Exceptions filed 7

Statement of facts 7

Thomas J. Ayres testimony 8

Holtzmans testimony 8

Instructions refused for plaintiff . . . 9

Instructions given for Defendant . . . 10

Nonsuit 11

Motion to set aside nonsuit &c . . . 11

Costs 11

Attest

Thos. E. Thompson Clk

OWEN & HIRSBURG
SOLEP
MASS.

Error from
Marion Circuit Court

Nancy S. Depew, plaintiff in Error
vs
Archibald S. Robards, defendant in Error.

Attorneys
Thomas L. Anderson for plaintiff

Harrison & Hawkins }
William M. Cooke } for defendant

(33) 3

October Term 1852

Nancy S. Depew
Plff. in Error

vs

Archibald S. Robards
Dept. in Error

Error from Marion

Filed 23d September 1852
Wm. S. Glanville, Clerk.

Nancy S. Depew appellant vs Archibald S. Robards Respondent	In Sup Court October Term 1852

And now at this day the said appellant comes, and says that in the record & proceedings of the said Circuit Court ~~of Marion County~~ there is manifest error in this viz: That the said Circuit Court erred in giving the instructions asked by defendant.

2 That the said Court erred in refusing to give the instructions asked by appellant.

3 – The Court erred in in giving judgment for defendant. –

Wherefore the said appellant prays the said judgment may be vacated. set aside & held for naught.

Anderson & Buckner
for Appellant

Nancy S. Dupuy
vs.
A. S. Robards.

Assignment of
Errors.

Buckner for
appellant

Filed 22nd October 1852
Wm Glanville, Clerk

Nancy S. Dupuy
vs.
A. S. Robards.

Assignment of Errors.

Nancy S. Dupen plaintiff & Appellant
vs
A. S. Robards, Deft & Respondent

Sup. Court.

Appeal from Marion C. Ct.

This was an action to recover the value of a piano, stool & cloth cover. The defendant claimed property in himself, and on the trial of the cause before the court, without a jury, it appeared in evidence that the plaintiff came to this state in 1848 from Indiana on a visit to her ~~with her mother~~ and ~~boarded in~~ Howard County. There she became acquainted with ~~married~~ a man who had settled in Fayette as a practitioner of medicine & was known by the name of Dunn. Dunn passed himself off as an ~~single m~~ unmarried man. Subsequently on the return of plaintiff to Indiana, Dunn followed her & he the plaintiff were then married in Nov. 1848. After the marriage they came back to Fayette in this State, ~~[illegible]~~ bringing with them the piano &c. in controversy & some other articles of household furniture which had been given to the wife by her mother. When they reached St Louis owing to the condition of navigation of the Mo. River they went up to Hannibal, where they remained 3 or 4 days as husband & wife & thence ~~went~~ to Fayette by stage, leaving the piano &c at St. Louis. Dunn remained in Fayette but a few days & returned to St Louis from

ising to return in a few days. week. On his arrival at St Louis, he caused the pianos &c to be shipped to Hannibal & then he sold them to the deft. & has not been heard of since. It was proved that previous to his marriage with plff he had been married in Wisconsin - that he was then known by the name of Preston & that at the time of his marriage with plaintiff, he had a wife living in Wisconsin. There was no evidence that deft had any knowledge of this plaintiff's marriage with Dunn. Dunn and the appellant were together in Hannibal where appellee lived, for several days treating each other as husband & wife anterior to sale of the property to appellee. The appellant was of full age.

On this State of facts. the plaintiff asked the Court to declare the law to be, that if the plaintiff was the owner of the piano, stool & cover, sued for & one James L Dunn, from whom deft claims to have bought the same, became possessed thereof only by fraudulently representing himself to plaintiff, as being an unmarried man, & plff trusting to such representations married him, and said Dunn at the time of the marriage had a wife living, which fact was unknown to plff. then said marriage between said plff & said Dunn was void, and vested in said Dunn no title to plffs property nor any right to sell or dispose of the same, and the said plff is entitled

to recover the value thereof

2 That if James L. Dunn from deft claims to have purchased the stool, piano cover, sued for, only obtained the possession of the same from said plaintiff, by a fraudulent & void marriage such possession did not authorize said Dunn to sell the same, nor did a sale of the same by said Dunn to said deft vest in him any title to the same

3. That if Dunn had a wife living at the time of his marriage with plaintiff said marriage with plaintiff was void - and if said Dunn had no other title to said property sued for except that derived from a void marriage, and deft purchased said piano, stool & cover, without knowing of said marriage, said purchase vested in said deft no title, and said plaintiff is entitled to recover of said plaintiff the value of said property. - all of which were refused by the Court - and on the application of deft. the Court gave the following as the law of the case.

If Dunn obtained the possession of the property sued for by virtue of a void marriage with the plaintiff, and held the possession of the same as owner by the consent of the plaintiff, and sold said ~~plaintiff~~ property to the defendant for a valuable consideration, and defendant purchased said property without notice ~~for a valuable~~

~~consideration~~ that Dunns marriage with plaintiff was fraudulent and void, then defendants title is good against the plaintiff — To the action of the court in refusing the instructions asked by plaintiff & giving that asked by deft. plaintiff excepted, & submitted to a nonsuit, with leave to set the same aside. A motion was subsequently made to set aside the nonsuit which was overruled by the court, and plaintiff excepted & has brought the case to this court by appeal.

A. H. Buckner for plff.

Wm M Cooke for Dfd & in error

3

Nancy S. Depew vs. A. R. Robards

Statement of the Case by A. H. Buckner for appellt.

Filed 23d Oct. 1852
Wm L. Slaneville, Clerk

Nancy S. Depew
vs. } Error to the Marion
A. S. Robards } Circuit Court.

The case was shortly this: James Dunn who had a wife living, imposed himself on Nancy S. Depew (the plaintiff) as a single person, and married her. Among other things owned by Nancy Depew was a piano: After her marriage in Indiana, this was brought by her supposed husband to Hannibal in this State; Dunn and Mrs. Depew remained some days at Hannibal cohabiting as man and wife:: Afterwards Dunn sold the piano to the defendant Robards & absconded: There is no dispute, but that Robards purchased in good faith. This suit was brought by Nancy Depew against the defendant to recover damages for the conversion of the piano:: Under the instructions, given, the plaintiff submitted to a nonsuit and sued out this writ of error.

The fixed principle of our law of personal property is, that no person can be divested of his property without his own consent; and consequently that a purchaser in good faith under a defective title cannot hold against the true owner. That no one can transfer to another a better title than he has himself is a maxim of our law. An exception to this rule in the ancient English jurisprudence, was, that of sales in markets overt, a custom which has not been introduced among us. Another excep

tion to this rule, existed in relation to cash, bank notes, checks & bills payable to bearer or which were transferable by mere delivery without any assignment. At an early period of our commercial law, it was held that money & bills payable to bearer, though stolen could not be recovered after they had been passed away to a bona fide holder, and this by reason of the course of trade which creates a property in the holder. They pass by delivery only & are considered as cash & the possession of a bona fide holder always carries with it the property. This rule is founded on the necessity sustaining the credit of that which is used as the medium of exchange in commercial transactions.

Another exception to the rule, that the owner of personal property cannot be devested of his title without his consent, is, where the owner by his own voluntary act has conferred upon another, under whom an honest purchaser claims, the apparent right of ownership and disposal of his property; and this holds although the owner may have been deceived and imposed upon in bestowing this right of ownership and disposal. This principle is illustrated by the case of Mowey vs. Walsh 8. Cow. 238 where it was held that although one obtains goods by a fraudulent purchase under a forged letter of credit and guaranty, yet if he afterwards sells them to a bona fide purchaser, without notice of the fraud the property passes to the purchaser.

OWEN & HEDDEN
SALEM
MASS

To the same effect is the case of Parker vs. Patrick 5th Term 175. 8 Mo 139. The law protects the honest purchaser, when the owner, although induced by fraud or mistake, has voluntarily given to another the apparent right of property or sale. But if the owner loses his property or is robbed of it or if it is stolen from him, or if it is sold or pledged without his consent by one who has hired it or to whom it is loaned or who has it in his possession for transportation or for mending or repairing it; in all these cases the owner may reclaim his property wherever found, however innocent the person may be to whose possession it may be traced and whatever consideration he may have given for it.

Nancy Depew was shamefully imposed upon by James. L. Dunn, yet she voluntarily placed him in a situation and clothed him with a character, in which he was apparently authorized by law to dispose of her property, and a sale having been made of it by him, the honest purchaser must hold it. Although the marriage as between the plaintiff and Dunn was a nullity and did not effect her rights, yet as it was by her act, that Dunn was enabled to commit a fraud, it is more reasonable, that she should bear the loss, than the innocent purchaser.

The other judges concurring the judgment will be affirmed.

Wm Scott

Dupew
vs.
Robards

opinion

Filed 9th May 1853
Wm. S. Glanville
Clerk.

Dupin Appellant } In Sup. Court.
v.
Robards Respondent } Appeal from Macon Circt. Court.

(Brief of Appellants Counsel)

The only question in this case grows out of the instructions given & refused by the Court below - and that is does a purchaser without notice & for valuable consideration of personal property obtain a title thereto against a woman whose property has been wrested out of her possession, by virtue of a fraudulent & void marriage - or in other words, can a man pass a good title to property which he has acquired from a woman by a void marriage. We say not, and that the title of the plaintiff has never been divested -

1 - The possession of Dunn was not legal but wrongful, & tortious, and the rule of Caveat emptor applies -

2. The plaintiff never gave her free & voluntary consent to ~~defts~~ Dunns possession of the property. Her consent was obtained by fraud - and Dun's representation & his possession was not her free act

act. 2 Kents Com. 324 + 5. Wheelwright v Depeyster. 1. Johns R. 480. 5 Ham (O) R. 202 – 6. Sergt. & Rawles 130

3. The doctrine as to personal chattels is that one cannot transfer any greater right than he has – & a bona fide purchaser only succeeds to the rights of the vendor. ~~In this case Davis right was in fact no~~ Possession does not carry with it the evidence of property except as to cash. bank. bills &c. and unless the party rightfully entitled does some act which imposes upon third parties, the right of property is not divested. Here both parties are equally blameless – ~~the plaintiff & defts.~~ and the deft must ~~therefore have~~ suffer from the application of the maxim of caveat emptor. See Long on Sales. by Rand p. 167 + 168. & cases there cited 5 Rand 366 – 1 Tuck Com. 359. 1. Wash 217. – Root v French 13. Wend 570

4. The marriage between plaintiff & Dunn being void, his possession of the property was as agent, or trustee for her, without the power of disposition, or transfer — and his sale would pass no title whatever. Wilkinson v. King, 2 Camp. R. 335.

A. H. Buckner
for Appellant.

Nancy S. Deper.

vs.

A. S. Robards

Brief of Appellants

A. H. Buckner for App.

2 Kent Com. 324 & 5

1 John R. 480

1 Tick R. C. 359

5 Randolph 366

Long on Sales 167 & 8

& authorities there cited

5 Wam (O) R. 202

Nancy J. Depew Plff. & appellant
vs
A. S. Robards Dfdt & Appellee

In the Supreme Court
October Term 1852
Error to Marion Cir. Court.

Brief by W. M. Cooke atty for Appellee.

It is submitted that the decision of the Circuit Court should be affirmed for the following reasons.

1. In divorces a vinculo matrimonii in cases where the marriage is a nullity in its inception, it is said that the wife shall have back the goods which she brought with her; but this is where the goods are not spent, If the husband dispose of them before divorce to an innocent purchaser she will not be allowed to reclaim them. Bright on Husband & Wife 2 vol p 365. 1 Tucker's Commentaries, p 100 (marginal) 1 Bl. Comm. p 440 (marginal) (353 Chitty's Edition. note 29) 1 Dyer 62 (13a) Shelford on Marriage & Divorce p 478 Law Library Vol 33

2. It is a general rule of law that when there are two innocent persons one of whom must suffer a loss by the fraudulent act of a Third party, that the loss must fall upon that one of the innocent parties whose act gave the fraudulent party power to impose upon the other. In this case it was the act of the appellant in marrying Dunn, in travelling with him as his wife, & remaining for some days in the town where appellee lived treating him as her husband which gave him the appearance of being the owner of the property sold to appellee, and enabled him thus to dispose of it.

3. That appellant was deceived before she did the act which gave Dunn the apparent ownership of the property, can make no difference. We admit that she was innocent; if guilty we should have rested the case upon her fraudulent connivance; but she was of full age, and it was her act which proclaimed him the owner of the property & gave him power to dispose of it. If A the own goods & be induced

to hold out B as the owner of them and B sells to a third party who has no knowledge that his possession & apparent title were obtained by fraudulent misrepresentation & deceit A will not be permitted to reclaim them. He will be estopped by his own act —

4. This case is analogous to a case of agency, where if the owner of personal property clothes another with the apparent muniments of title he would be bound by his acts in disposing of such property to an innocent purchaser without notice for valuable consideration, though the act were in violation of instructions & in fraud of the owner — Story on Agency Sec 443. and this not merely in the case of bank notes, negotiable securities, endorsed &c where indeed no act of the owner is necessary to enable the holder to dispose of them.

5. The maxim Caveat emptor is of very general application; but where the vendee of goods has, by fraudulent misrepresentation even, induced the vendor to sell to him, and before the sale has been annulled the fraudulent vendee sells them to a third person for valuable consideration without notice of the fraud, the innocent purchaser can hold them against the deceived vendor, though the sale might have been annulled before such transfer to an innocent party. The innocent purchaser holds a better title than the fraudulent vendee.

Mowrey & others v. Walsh 8 Cowen p 238 et seq

6. Again. Where the owner of goods has by his or her own act invested another with the ~~indicia~~ apparent ownership of them, (whether the act be superinduced by fraud or not) and thus held him out, as having power to sell; and such person accordingly sells in fraud of the rights of such owner to an innocent purchaser without notice for valuable consideration, such purchaser can hold the goods against the real owner. And this & the foregoing are exceptions to the rule that the possessor of goods cannot pass a better

title than he has to them.

20th Wend: p 267 & cases there cited (Senator Verplanck's opinion p 278 to 283)

7th It is not denied that if a man were to marry & cohabit with a woman, & she had a husband then living, he would nevertheless be bound by her acts as the acts of a wife so far as she had received credit from innocent third parties upon the faith of the existence of the relation of husband & wife – It is difficult to perceive a distinction between the two cases. The legal consequences of the acts & declarations of persons of full age are the same, without regard to the sex of the person.

Cooke for appellee

Depew
v
Robards. } Sup: Court

Defendts brief.