Hornsey, Robert vs. Casey, John H 1856 Washington 372/17
Hornsey, Clarissa
(formerly Nuckolls, Clarissa)

585/12

Clarissa formerly wife of Nuckolls, Garland
she divorced him

Ryland
affirmed
She has no right to land as part of dower

1 State of Missouri } Be it remembered that on the 4th
Washington County } Day of Apl 1855. there was
filed in the Office of the Clerk of the Circuit Court
of Said County a petition which is in the words and
figures following, to wit:

Robt Hornsey &
Clarissa Hornsey his wife
formerly Clarissa Nuckolls } Plaintiffs
agt
John H. Casey } Defendants

In the Circuit Court Washington County.

Plaintiff Clarissa Hornsey States that She was formerly the wife of Garland Nuckolls late of Washington County, that Sometime prior to the 3rd day of May 1851, in consequence of the bad conduct of her husband, She commenced a Suit against him for a divorce in the Circuit Court of Washington County, Such proceedings were had in Said Cause, that on the Said 3rd day of May 1851. the parties appeared before the Court in their proper persons and the cause came on to be heard upon the petition, answer and the evidence adduced on both Sides. In consideration whereof the Court found, that the petitioner Clarissa Nuckolls had resided in this State one whole year next before the filing of her Bill, that Said Defendant Garland Nuckolls, has been addicted to habitual drunkenness for the Space of two years, and further that the Said Garland Nuckolls, has offered Such indignities to the petitioner Clarissa Nuckolls as have rendered her condition

Plaintiff's Petition

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intolerable in this- That Said Defendant in his answer to the Plaintiffs Petition, did falsely charge her with the crime of adultery, which rendered it impropper impossible for the Petitioner to cohabit with defendant or to be under his dominion or control, and the court further found that the Petitioner Clarissa McNolly is the innocent and injured party, and the Defendant the guilty party" Whereupon the Court divorced her from the Bonds of matrimony contracted with Defendants, and ordered him to pay her Seventy five dollars per annum during her natural life for alimony & maintainance, and give Security to perform the Same. All of which will more fully appear by a certified Copy of the decree which is herewith filed Marked A. Said decree was never appealed from nor Set-aside but remains unreversed and in full force.

And So may it please the Court. The plaintiff Clarissa is informed by her Counsel, That She having been divorced from her husband for his fault, or misconduct doth not lose her dower. On or about the first of July 1854 Garland McNolly departed this life owning valuable Real Estate & Slaves, in Washington County and without any child or other descendants in being capable of inheriting leaving his wife Clarissa McNolly now Clarissa Horney by a Lawful marriage with Robert Horney in full life, who has never released her dower or other interest in any of the property of which he was Seized or possessed during his life time, and She is now entitled to her rights therein acquired by virtue of

3 her Marriage with said Garland Nuckolls, Plaintiffs further State that on the 6th day of November 1854, Clarissa Hornsey and Robert Hornsey made their certain Deed of election duly executed and acknowledged & filed in the Office of the clerk of the County Court of Washington County, by which She elected to take dower under the provisions of the 3rd Section of "an act concerning dower" approved March 24 - 1845. A certified copy of Said deed of election is herewith filed marked B. They further State that for Several years before the death of Garland Nuckolls, he became very intemperate, used ardent Spirits to great excess So that he became weak and imbecile & while in this condition he conveyed to John H Casey for the consideration of $900 rs the following described tract of Land, to Wit: One third of a tract of Land confirmed to Joseph Bloat, it being the East end of Said Confirmation and containing one hundred & forty one acres more or less being the Same land conveyed to Said Nuckolls by James Beaty & wife by deed bearing date August 17th 1825, Also the North West fracl 1/4 of Sec 8 T37 N R 3 East containing 2 40/100 acres more or less. Also the S E fracl 1/4 of Sec 6 T37 N R 3 E Containing 98 88/100 acres. Conveyed to Said Nuckolls by John Brickey & wife by deed dated 26 July 1834. The consideration of Said Deed is only $900.rs when the property was worth $2000.rs Said deed was made to defeat the full dower rights of Said Clarissa - it was executed a few months before his death and was in fact a will in disguise and an

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attempt to commit a fraud upon the rights of Said Clarissa, of all which acts and things the defendants had full knowledge, and he made Said purchase well knowing its intended effect. Plaintiffs Say that they are entitled to the undivided half of the foregoing tract of Land in fee Simple and that on or about the 29th day of February 1853, they demanded in writing of Said John H Casey to assign dower in the aforesaid tract to the amount of one half thereof in fee Simple and Said Casey refused to do the Same. Plaintiff asks the Court to declare the rights of Said Clarissa in the premises and give judgment that She be Seized of her dower accordingly, with a recovery of Such damages as they may Show themselves properly entitled to, together with Such other and further relief as the equity & justice of the case requires. Plaintiffs further State that Garland Nuckols had no other Real Property than as above mentioned and if Plaintiffs have mistaken their rights in making the election aforesaid, they pray that Said Clarissa may be endowed under the first Section of the dower Law, And if Plaintiffs have not prayed the right prayer they pray for Such relief as may be consonant to right & justice

Thos C Johnson atto for Plff

County of Washington

Robert Horney being Sworn States that he believes the foregoing Petition & the matters therein as Stated are true. Robert Horney

Sworn to & Subscribed before me this 3rd day of April 1855

Wm A Matthews clerk

By Sam Harrison Dep clk

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reswom to May 1st 1856.

W A Matthews Clk

The State of Missouri.

Washington County Sct

To the Sheriff of Said County Greeting: We comm-
-and you that you Summon John N Casey that
he be and appear before the judge of our Circuit
Court at a Court to be held at the Court house
in the Town of Potosi in and for the County of Wash-
ington on the last Monday in this present Month
(April 1853) then and there to answer the comp-
laint of Robert Horney and Clarissa Horney his
wife formerly Clarissa McNoly and have you there
and then this writ.

Summons

Witness William A Matthews Clerk
of our Said Court at Office in the
Town of Potosi this 1st day of April 1853.

Wm A Matthews clerk
By Sam Harrison Dept. Clk

Sheriff's Return

Served the within Petition, Affidavit and Summons
on the 5th of April 1853 by delivering to John N. Casey
a certified copy thereof in Washington.

Wm A Todd Sheriff

And afterwards on the first day of May 1856
the Defendant filed his demurrer to the plaintiffs
amended petition, which is in the words and
figures following, to wit:

Robert Horney & wife } The Defendant comes
vs } and demurs to —
J N Casey

6 Plaintiff's Petition as amended because it does not State facts Sufficient to Constitute a cause of action in this, to wit: 1st The facts Stated do not render the Deed of Garland McNolly to Defendant void or voidable as to this Defendant.

2 The Plaintiff by the facts Stated in the petition Shows that they are not entitled to Dower in the Land mentiond either under the first or the third Section of the Dower Law.

3 The petition Shows that Plaintiff's have made their election to take under the third Section, and they cannot claim in the alternative under the first Section thereof. John N Noell & Perry men for Defts

Demurrer

And on the Same day, to wit: the first day of May being at the April Term of Said Court 1856, the following order was made Sustaining Said demurrer.

Demurrer Sustained

Robt Hornsey & wife
vs
John H Casey

Now at this day come the parties by their attorneys and the demurrer of the Said defendant to the Plaintiff's Petition as amended being Submitted to the Court, it is considered by the Court that the Same be Sustained.

And afterwards, to wit: at the Same Term being the 2nd day of May 1856, the following order was made in Said Cause.

Robert Hornsey & wife
vs
John H Casey

Now at this day come

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Appeal Granted

the Plaintiff and filed his Appeal Bond in
this cause and prays an appeal from the decision
of the Court in this cause to the Supreme Court which
Bond is approved and appeal granted.

State of Missouri } ss I the undersigned Clerk
Washington County } of the Circuit Court in and
for the County aforesaid do hereby certify that the
foregoing contains a true and perfect transcript
of the Record and proceedings had in the case of
Robert Homey & wife against John H Carey as fully
as the same remains of Record and on file in my
Office.

In testimony Whereof I hereto
set my hand and affix the
Seal of said Court at Office
in the Town of Potosi this 23d
Day of September 1856.

Wm. A. Matthews Clerk

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Transcript & Postage $4.25

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(12)

Oct. Term. 1856

R. Homsey & wife
appellant

v.

J. H. Casey respondent

Transcript
Washington Cir. Ct.

Filed 25th September 1856.
Wm. S. Glanville
Clk

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Robert Hornsey & wife } Appellant
v. } Appeal from Washington C.
John H Casey } Respondent.

In the Supreme Court
Oct. Term 1856

And now at this day comes the Appellants by their Attorney and say that there is manifest error in the record & proceedings of the Court below in this that the judgment is for the Respondent when by the law of the land it should have been for the appellant

Wherefore he prays that the judgment be reversed.

Thos. C. Johnson Atty for
Appellant

45.

Robert Hornsey & wife
appellant

v.

John St Casey
Respondent

Assignment of errors
by Appellants
Johnson Atto

Filed 24 Oct. 1856
W. S. Glanville
Ck

Robert Hornsey & wife
against
John H Casey
Appellants
Res

Respondent by his attorney comes and says there is no error in in the record proceedings or Judgment of the court below and this he prays may be so determined by the court

M Frissell atty
for Casey

R Hornsey &
wife Appellant
against
John Carey
Respdt

Joinder in
error —
M Fitzpatrick

Filed 25 Oct. 1856
W. S. Glanville
Ch.

R Horsey & wife
against
John Casey

In reply to the arguments and authority adduced by the Plaintiff and appellant Respondent Casey says

1st, That the arguments and authorities apply to cases where the wife has been defrauded, or an attempt has been made to defraud her of her dower at common law, not to what she might receive from the estate of the husband in certain contingencies pointed out by the statute, in lieu of dower

It would be perfectly proper for the husband to convey his land for the purpose of confirming his wife to the common law dower and if he had done so it could not be charged as fraudulent as to the wife. Such act would not deprive the wife of the right to to elect, but it might deter her from electing to give up her dower under the first section.

His conveyance of his land does not deprive the wife of any legal or equitable right. The law provides that she shall be endowed of all lands in which the husband at any time during the marriage was seized of an estate of inheritance to which she has not relinquished her right of dower

It also when there are no children gives her an election to take one half of the land subject to debts or one third for life discharged of debts. The conversion of the land into money does not diminish the value of her dower unless the money has been squandered. She is to be

endowed of personal as well as real estate. If the money arising from the sale of the land has been applied to the payment of debts or to the support of Nuckolds her dower is not in the least diminished by the sale. If the court were to decide that she was entitled to the fee in one half of the land she should at least be compelled to give up the half of what the land sold for out of the personal estate for the personal estate has been increased by the amount of money arising from the sale of the real estate.

It would seem that Hounsey & wife are claiming to be doubly endowed for they claim both the half of the land and the half of the money that Nuckolds received for the land. This would have the appearance of fraud if not fraud in fact.

M Fresell atty
for Casey.

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R Hounsey & wife
against
J H Casey

Brief

Filed 25 Oct. 1856
W S Glamieu
Ch

Horsey Wife vs Casey -

This is the same case, reported in 21 Mo. Rep. 545 — The only remaining question is whether the election made under a mistake as to her rights may be set aside on a proper application for that purpose - The petition was amended after the case was reversed and sent back, by adding an averment that Casey the Purchaser took with knowledge of all the facts charged in relation to the title of the real estate &c -

To this amended petition the defendant demurred; judgment was rendered thereon for the defendant — This case is subject to the same law as before laid down in regard to it -

The only question now is whether the Mrs Horsey can be relieved against her election and be allowed now to take dower under the first section of the Dower law -

In our opinion the plain

tiffs Hornsey and wife have no such right - They are not entitled to be thus relieved - They deliberately make their election by deed: They were not content take dower under the first section - They wanted more and a larger estate. Now when they find themselves disappointed, they wish to take only what they at first rejected - They have showed themselves entitled to no such relief -

In the petition, they have not pretended that they were deceived; they have stated no facts constituting a mistake: They were not misled by any false or deceptive statements. They knew the difference in regard to dower under the first section and under the third section, or they would not have made their election by deed -

Let the judgment be affirmed. Judge Leonard concurring -

Judge Scott, dissents

John F Ryland

Homsey et ux

vs

Casey

Opinion

Ryland

Filed 15 Decr. 1856

Wm J Glanville Clk

Hornsey & wife } appellant
v. } Appeal from Washington Co.
Casey. } Respondent.

In the Sup. Court of Ms.

To. The Hon. Supreme Court of Mississippi.

The petition of Thos B. Johnson Attorney for the appellants respectfully ~~states~~ asks the Court to modify its judgement in the above caused and as reasons therefor states the following.

When this cause was before this court at the October Term 1885 the Court used this language "the rights of a purchaser should not depend on any secret intent of the vendor which is not communicated to him and of which he has no knowledge." The cause being remanded, the plaintiffs Counsel amended his petition charging that Casey had full knowledge of Nuckolls intent to defeat his wife's dower and that he participated in it, well knowing its intended effect. This amendment it was considered obviated the objection apparent on the petition. The failure to make the averment charge Casey with a guilty knowledge was entirely an oversight in the Atty who drew the original petition. Plaintiffs Counsel never ~~could~~ contended that the election could affect Casey if his purchase was ~~wholly~~ bona fide. Plaintiffs Att being certain that this amendment would satisfy the views of the Court, added another amendment to the prayer of the petition stating that if the plaintiff had mistaken their rights in making an election to take dower under the 3rd section, she prayed to be endowed under the 1st section. The Court upon a reconsideration of the cause by a majority of the court have just decided, that the fact that Casey had a guilty knowledge of Nuckolls' designs as to his wife's dower and that he participated in the matter for the purpose of defeating Mrs Nuckolls dower made no difference:— that Nuckolls had a right by fair or foul means to defeat his wife's right of election. It is most respectfully stated that this decision has taken the Counsel of Mrs Hornsey very much by surprise and will also surprise other members of the Profession. The undersigned however do not seek to reopen this question. He admits it was decided that a husband can always defeat ~~the~~ by deed the provisions of the third section & compel a wife to accept the

provisions of the 1st section though under the same circumstances he could not do it by will. What I ask is that the court will not absolutely affirm the case, but send it back with leave to amend as to the facts constituting a mistake. The Court in its opinion just filed say "In the petition they have not pretended that they were deceived: they have stated no facts constituting a mistake They were not led by any false or deceptive statements. They knew the difference in regard to dower under the first section and under the third section or they would not have made their election by deed." Now it is submitted that the plaintiffs have had no opportunity as yet to charge the facts constituting a mistake. It was believed that under the opinion first delivered, to charge that Casey had a guilty knowledge of Nuckolls' intent & participated in his act would constitute a good cause of action against Casey. If so of course there was no mistake & no facts constituting a mistake could be averred Yet by way of caution it was stated that if the plaintiffs were mistaken, they asked to be endowed under the first section. This is all that could be said in advance of a decision that she had made a mistake. That question now being decided we now ask to aver the facts constituting the mistake ~~which~~ which will make out a mistake of law. While ignorance of the law is never relieved against mistakes of law are. And the reason is that the former cannot be proved while the latter can. The cases cited in the brief fully sustain the point. And in New York where the doctrine was once doubted it seems to be now admitted that a mistake of law can be relieved against where the opposite party can be put into the same condition that he was before the election was made. By the cases cited in the brief, it will be seen that lawyers were called upon to know what was the general opinion of the profession at the time the act was done. In the present case it will be averred that the election was made under the advice of an accomplished young law-yer (Geo. Young) that Mrs Ramsey had the right to treat the deed to Casey as a nullity made for the purpose charged, so far as her dower rights were concerned and although the

point had not been expressly decided, that the reasons of the rule laid down in Davis v. Davis 5 Mon R & Stone v. Stone 8 Mon R. fully covered this case. It will be shewn & averred that other members of the profession thought the same way. It is admitted that the point was never before decided. It will be averred & shewn that the opinion of the profession generally concurred with that of Geo Young. But the Court have decided adverse to that general opinion Now can it be right that Casey should keep the whole land & Mrs Hornsey in trying to get what lawyers told her she had a right to under the law, should in fact get nothing. I ask that she be allowed if she can to shew sufficient facts to make a case of mistake of law or fact or both which this Court will relieve against. I do not ask your Honors to decide in advance what facts are sufficient to induce the aid of a court in relieving against the consequences of a mistake, but simply that we be permitted to amend our petition and shew a proper case for relief if we can. If we can shew a proper case (and I believe we can) we shall be relieved, if not we will have to lie down under the consequences of this false step most innocently taken. I will further state that although Mrs Hornsey was the divorced wife of Ruckells, yet from personal knowledge I will state that she is a most estimable & virtuous woman & one who while the wife of Ruckells was most deeply wronged the whole community were in her favour, for she suffered until human nature could no longer endure. And when she at last sought the aid of the courts, Ruckells attempted to defend her infamous by charging against her the highest crime of a woman — but a charge which he could not & did not even endeavour to sustain. And so indignant was the court, that this very fact is made one of the grounds for granting her a divorce. Such a man as Ruckells & such as would confederate with him ought not to get any thing from this Court more than strict law. And I am sure if this Court can modify its judgment & permit Mrs Hornsey to amend her petition & shew her case, it will be aiding the cause of substantial justice to the feeble part of mankind — a cause I know dear to

In the Supreme Court

Homsey & wife

agt.

Casey

Petition asking a modification of the judgement of the Court.

Thos. C. Johnson
Atty for Homsey & wife

Filed 17 Decr. 1856
Wm. L. Glarville
Ck.

the heart of every member of this Court.
Thos. C. Johnson Atty for
Homsey & wife

Hornsey & Wife
ag.
John H Casey

Points and authorities

1. It is not denied that the rights of Mrs Hornsey are precisely the same so far as this question is concerned as if she had remained the wife of Mickolls up to the period of his death. Being the innocent & injured party her dower is saved as if she had not been divorced.

Laws of '45 Dower Sec 9.

2. It is insisted that the deed made by Mickolls to Casey and on the circumstances charged in the bill and for the purpose of defeating the full dower rights of his late wife in the real estate & which purpose was well known to Casey, cannot be permitted to operate according to his intention. This has been expressly decided in regard to personalty. Davis v. Davis 5 Mo Rep 189 Stone v. Stone 18 Mo Rep. 391. The principles of the decision are 1st That a conveyance made under the circumstances stated in the petition is looked upon as a fraud, and fraud vitiates the most solemn transactions and 2nd that a man cannot by will cut his wife off with less than the law allows and a deed made in expectation of death & while in a weak & imbecile state of mind & for the purpose of defeating dower is looked upon as a will in disguise which a wife is entitled to renounce. See particularly Davis v. Davis Supra. The law having forbidden a man to defeat or impair his wifes dower by will, does not permit him to contravene its policy & do it by deed. It is submitted that the reason of the decisions apply as strongly to dower in lands as to dower in personalty

But it is contended that a man has a right to defeat his wife's right of election. This is denied. If the right to defeat exists, the husband can exercise it by last will. It must be remembered that election is only given to the wife of a man who dies without children. Now in such a case suppose he wills her one third of his lands for life. Is she bound by it? She can renounce the will, make her election & take one half in fee. He cannot defeat the right by will. Now if the deceased in expection of death and

under the circumstances stated in the petition finding that he could not defeat the right by will should attempt the same thing by deed, would his act have any greater effect. You cannot do indirectly what you cannot do directly. The law has conferred this right of election in one class of cases — it is a valuable right and should be as much respected and protected as any other right. In all that we have said, we do not wish to be understood as contending that a man may not make bona fide sales of his property and thus in fact make the right of election undesirable. We contend that a man cannot defeat the right by a mala fide disposition of his property. We have said the right of election is a valuable right. The tract of land in which dower is asked in this case is worth $3000.—: a life estate in one third is worth according to the usual tables based on probabilities about $650.— while one half in fee is worth $1500. There are really no valid debts of any amt worth mentioning so that the right is really worth to Mrs Horney $850.— If there had been the amt in a negro & the husband had attempted to deprive the widow of it under the circumstances charged, the Court would under the decisions cited protect that right. Now can it make any difference whether she be entitled to that amt in negroes or lands. The right is given by law and it should be protected by law.

3. The Court say in its opinion when this case was up before, that the case of Stowe v. Stowe was founded on a complaint that the disposition of the property by the husband had defeated the right to dower not merely the right of election and that the same remarks was applicable to the case of Davis v. Davis. It is with great respect submitted that this circumstance does not prevent this case from coming within the meaning & intent of those decisions. Election is spoken of as something different from dower. The law gives the woman the right to say whether she will take her dower under the first or third sections. When she elects to take under the third section she elects to take dower — not something in lieu of dower. It is true that the word "Dower" is not mentioned in the third section; neither is it in the second section. Yet no one pretends that the 2nd section does not give dower in personalty. Dower according to Bacon is that part of the husbands estate which goes to the wife

on the death of the husband. Both the 2nd & 3rd Sections are a provision for the wife after the death of the husband and come fully within the definition of dower as given by Bacon. In the 2nd Section, the wife only has dower in the personalty belonging to the husband at the time of his death. This Court has said that personalty disposed of in the manner charged in the petition is for the purposes of dower still considered as belonging to the husband at the time of his death. It is redelivered to the husband till the wife is endowed. Here the Court permits the wife to say that this property should not have been so disposed of. In the 3rd Section the wife is entitled to one half of the lands "belonging to the husband at the time of his death" - precisely the words used in the 2nd Section. Now if personalty disposed of in the manner charged is still considered as belonging to the husband at the time of his death and subject to the wife's right of dower why should not the real estate disposed of with the same intent be still considered as belonging to the husband for the purpose of dower. If the right should be prohibited in one case, it should also be in the other.

4. The petition states that Nuckolls had no other real estate than that mentioned in the petition and if Mrs Hornsey has mistaken her rights in making the election aforesaid, she prays that she may be endowed under the first section. Casey says you had no right to make the election to take dower under the 3rd Section and your election is void and yet when she asks to be endowed under the first she is told that she cannot be because she has elected to take under the 3rd Section. If Mrs Hornsey had no right to elect, her deed of election is void and neither affects Casey nor her own previous rights. No one can pretend that Mrs Hornsey intended to give up her dower under the 1st Section if she could not get dower under the 3rd. If this Court decides that she could not elect under the circumstances of this case, then she has acted under a mistake of law. She was advised by Counsel that she had a right to treat Nuckolls deed to Casey as null and take as if it had not been, and it was believed that this Court had decided the principle in the Case of Davis v. Davis & Stone v. Stone.

If it turns out that the Counsel is mistaken, it is a clear mistake of law which the Court will relieve against. No wrong is done to Casey He is put exactly where he was before the election was made. The Court can restore the parties to their former Condition. Courts will relieve from mistake of law as well as of fact. They will not relieve from ignorance of the law because it is not susceptible of proof, but they will of mistakes of law because they are as susceptible of proof as mistakes of fact. Lawrence v. Beaubien 2 Bailey Rep. 651 Ex[r] of Hopkins v. Mazyck 1 Hill's Chan Rep. 251, Lowndes v Chisholm 2 McCord Chan Rep. p 462. Lansdown v Lansdown 1 Mosely R. 364 Key, Hall v. Reed 2 Barb. Chan Rep 505 Fitzgerald v. Peck 4 Littel Rep. 127. In Lowndes v Chisholm 2 McCord Judge Colcock says without attempting to investigate the propriety of this distinction (referring to the distinction above alluded to) being well founded it is obvious that Cases may arise in which it becomes the duty of a court of equity to relieve against the consequences of a mistake at law as well as against those of a mistake of fact. The law is sometimes doubtful A sudden and important alteration of a well established doctrine on any particular subject by a crude undigested act of the legislature often times produces such uncertainty as to render it extremely difficult to know what the law is until the proper tribunals have given the act some exposition p. 462. The doctrine in New York seems to be in some doubt as will be seen by turning to the case of Champlin v. Layton 18 Wendall R 424 Two Opinions are delivered in that case one opposes the doctrine, but that of Senator Paige approves all the cases cited In a later case of Crozier v. Acer 7 Paige Chan Rep 143 it seems to be admitted that a mistake of law can be relieved against where the defendant has lost nothing by the mistake & where the parties can be restored to the same situation substantially in which they were at the time the mistake happened p 143.

Again: the doctrine peculiar to election is that a party is entitled to have all questions both of law & fact settled before he is bound to elect. In other words he is entitled to have

all doubts settled so that he may act understandingly in making his election. Chancellor DeSaussure in the case of Hall v Hall 2 McCord Chan Rep 280 says "the cases have gone so far that after the wife has made her election and received benefits under the will she has been allowed to retract and assert to her legal rights, when the estate has turned out differently from what it was believed and stated to be at the time of the election prematurely made.. Johnson Chancellor in the case of Pinckney v. Pinckney 2 Richardson's Eq. Rep 237 says "A party is not bound to elect until all the circumstances necessary to enable him to make a deliberate and discriminating choice are ascertained and if he make an election without it he is not bound by it." In this case Mrs Hornsey made her election under the advice of an able young lawyer (Geo Young) that she had a right to treat Nuckolls conveyance as a nullity and that so far as Dixon is concerned the Courts would regard the land as belonging to him at the time of his death. It turns out now that this point is decided differently from what her Attorney thought & she has no right to elect. In the mean time Casey is not injured. She is surprised but is it possible that she looses all. That because she thought she had a right to more than a third for life in which she was mistaken. that she is now to be cut off with nothing & Casey be permitted to run away with her whole right? This surely cannot be the law.

It is therefore insisted that if the Court shall be of opinion that she had no right to elect, that it will adjudge that she is entitled under the first election upon the grounds just stated.

5. It is suggested by Mr Fripp that if the Court adjudge that Mrs Hornsey is entitled to one half of the land she should not get any part of the money for which the land is sold. To this I answer that this question cannot be raised in this stage of the case. The facts should be set up in the answer. But I will simply inform

the Court that Admt who is Nickolls sister has never inventoried a dollar of money & pretends that she never received any money I could state a good many facts that would astonish the Court but shall not do so because they are not in the record & could not be properly noticed.

Hornsey & Wife
Appellant
v.
John H. Casey
Respondent

Points by
Thos. L. Johnson Atty for
Hornsey & Wife

In the Supreme Court
Oct Term 1856

Robert Hornsey &
Clarissa Hornsey his wife — appellant

v.

John H Casey — Respondent

Appeal from Washington Circuit Court

This case was before this Court at the October Term 1855 and decided upon demurrer. The facts set forth in the petition will be found in 21 Missouri Repots p. 545, which read. Plaintiffs had recovered below - defendant stood on his demurrer and appealed to this Court and this Court reversed the judgement upon the ground if we rightly understand it, that it did not appear that Casey had any knowledge of the secret intent of the vendor (Nuckolls.) The case was remanded to the Circuit Court and the petition was amended by adding that "the defendant Casey had full knowledge of all the acts and things charged in the petition and that he made the purchase from Nuckolls well knowing its intended effect. There was a further amendment stating that Nuckolls had no other real estate than that mentioned in the petition, and if plaintiff had mistaken their rights in making the election aforesaid, they pray that said Clarissa may be endowed under the first section of the dower law. And if plaintiffs had not prayed the right prayer they prayed for such relief as may be consonant to right and justice.

To this amended petition a demurrer was again filed stating the following grounds. 1st The facts stated do not render the deed of Garland Nuckolls to defendant void or voidable as to this defendant. 2nd The plaintiff by the facts stated in the petition shows that they are not entitled to dower in the land mentioned either under the 1st or 3rd sections of the Dower law. 3rd The petition shows that plaintiff have made their election to take under the 3rd section, and they cannot claim in the alternative under the first section thereof.

The Court sustained the demurrer and the

Appeal from Washington Co.

Hornsey + wife

v.

Casey —

Statement of the case by

appellants.

Thos. Johnson

Atty for Hornsey + wife

Plaintiffs appealed both Cases.

Thos. Johnson Atty for

Appellants.