

Daviess Vs. Fairbairn

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Appeal No. : 44 U.S. 636

Appellant : Daviess

Respondent : Fairbairn

Judgement :

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Daviess v. Fairbairn

44 U.S. (3 How.) 636

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF KENTUCKY

SYLLABUS

In affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute as consistent with it must be considered in force.

If a subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute clearly intended to prescribe the only rules which should govern, it repeals the prior one.

Under the application of these rules, the law of Virginia, passed in 1776, authorizing the mayor of a city to take the acknowledgment of a *feme covert* to a deed, is not repealed by the act of 1785, or that of 1796.

It was an ejectment brought by the heirs of Mary E. Fairbairn, to recover a half-acre lot in the City of Louisville, designated on the old plan as number 22, and on the new plan as number 31.

There were many questions in the case, but as the opinion of the court turned upon a single point, it is not necessary to state any except that one.

On 12 March, 1811, Mary E. Fairbairn, being the wife of Thomas H. Fairbairn, and the owner of the lot in controversy, subject to the dower interest of her mother, united with her husband and mother in executing a deed for the premises. She then resided in the City of Baltimore. It was alleged by her children and heirs that this deed was incompetent to pass her interest, being improperly executed.

They therefore brought an ejectment to recover it.

The deed was as follows:

"This indenture, made this 12 March, in the year of our Lord 1811, between Elizabeth Henry, Thomas H. Fairbairn and Maria his wife, (daughter and heiress of Daniel Henry, deceased), of the City of Baltimore, in the State of Maryland, of the one part, and Dr. Richard Ferguson, of the Town of Louisville, in the County of Jefferson and State of Kentucky, of the other part, witnesseth that the said Elizabeth Henry, and Thomas H. Fairbairn and Maria his wife, for and in consideration of the sum of eight hundred dollars, current money of the United States of America, to the said Thomas H. Fairbairn in hand paid, at and before the execution of these presents, the receipt whereof is hereby acknowledged, the said Elizabeth Henry, as tenant in dower, hath aliened, released, and confirmed, and

by these presents doth alien, release, and confirm, and the said Thomas H. Fairbairn as tenant by the curtesy, and the said Maria his wife, as tenant in fee simple, have granted, bargained, sold, conveyed, released, and confirmed, and by these presents doth grant, bargain, sell, release, convey, and confirm, unto the said Richard Ferguson, his heirs and assigns, forever, a

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certain lot of land, with all the appurtenances, situate, lying, and being in the Town of Louisville aforesaid, and known on the plan or map thereof by the number ninety-one (91), containing half an acre, be the same more or less, on Main Street, adjoining the northwardly side of the half-acre lot whereon the said Ferguson now lives, and between the same and Main Street, to have and to hold the said half-acre lot number ninety-one, with all the appurtenances, unto the said Richard Ferguson, his heirs and assigns, to his and their only proper use and behoof forever. And the said Thomas H. Fairbairn and Maria his wife do covenant and agree to and with the said Richard Ferguson and his heirs and assigns that they, the said Thomas and Maria, will, and their heirs, executors, and administrators, shall warrant and forever defend the said lot of land numbered ninety-one, with all the appurtenances, unto the said Richard Ferguson, his heirs and assigns against all and every person or persons whatsoever lawfully claiming or to claim the same."

"In witness whereof, the said Elizabeth Henry, Thomas H. Fairbairn, and Maria his wife, have hereto set their hands and seals, on the day and year first written."

"ELIZABETH HENRY [L.S.]"

"THOMAS H. FAIRBAIRN [L.S.]"

"MARIA ELIZA FAIRBAIRN [L.S.]"

"Signed, sealed, and delivered, in presence of:"

"EDW'D JOHNSTON"

"JNO. HARGROVE"

"HENRY PAYSON"

"CUTH. BULLITT"

"THOMAS LESTER"

"Baltimore County, State of Maryland, sct.: "

"Be it known and remembered, that on this 12 March, 1811, Elizabeth Henry, and Thomas H. Fairbairn and Maria his wife, parties to the within and foregoing deed of conveyance to Dr. Richard Ferguson, come in their proper person before me, Edward Johnston, Mayor of the City of Baltimore in the state aforesaid, and signed, sealed and delivered said deed of conveyance, as and for their voluntary act and deed, and the said Maria, being privately examined by me out of the presence and hearing of her said husband, did of her own free will and consent again consent to and acknowledge the said deed of conveyance as and for her act and deed, the same being shown and explained to her, and also relinquished and released all her right, title, interest, and estate, and fee of, in, and to the lot of land number 91, with all the appurtenances by the said deed conveyed, or intended to be conveyed."

"In testimony whereof, I have hereto set my hand, and caused the corporate seal of the City of Baltimore to be hereunto affixed the day and year above written."

"EDW'D JOHNSTON, Mayor of the City of Baltimore"

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Upon the trial in the court below, the following instructions were given with reference to this deed.

"And in substitution of a number of instructions moved by the plaintiff, the court gave to the jury these instructions."

"Instead of the plaintiff's instruction No. 1, the court instructed the jury that the deed of conveyance by Thomas H. Fairbairn &c.;, of 12 March, 1811, to the defendant Dr. Richard Ferguson, whereof a copy was read in evidence by the plaintiff, was not in law the deed of the *feme covert* Maria E. Fairbairn, is not her deed of conveyance for any purpose whatever, and passed from her to Dr. Ferguson no estate whatever in the lot of land in controversy."

The bill of exceptions brought up this instruction, amongst others:

The question was, whether the Mayor of the City of Baltimore had a right to take the acknowledgment.

The act of Virginia, passed in 1776, which had been adopted by Kentucky, (4 Littell's Laws of Kentucky, 432) allowed the mayor of a city to take an acknowledgment where the grantor resided out of Virginia.

Two acts were afterwards passed by Virginia, one in 1785 and the other in 1796, prescribing other modes of taking acknowledgments in such cases, and the question was whether these acts repealed that of 1776. The provisions of these acts are quoted in the opinion of the Court, and need not be repeated.

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MR. JUSTICE Mc LEAN delivered the opinion of the Court.

The lessors of the plaintiff brought an action of ejectment to recover a half-acre lot in the City of Louisville, numbered on the new plan of the city ninety-one. Richard Ferguson, Daviess, and others, were made defendants. The jury found the defendants guilty, and a judgment was entered against them. On the trial, exceptions were taken to various rulings of the court, only one of which it is material to consider.

The court instructed the jury

"That the deed of conveyance, by Thomas H. Fairbairn and wife, of 12 March, 1811, to the defendant, Dr. Richard Ferguson, whereof a copy was read in evidence by the plaintiffs, was not in law the deed of a *feme covert*, Maria E. Fairbairn, is not her deed of conveyance for any purpose whatever, and passed from her to Dr. Ferguson no estate whatever in the lot of land in controversy."

The plaintiffs below claimed as heirs at law of Maria E. Fairbairn. The fairness of the purchase of the lot by Ferguson was not controverted, nor that he paid for it an adequate consideration. The lot having descended to Maria E. Fairbairn, and her husband being dead, her heirs claim the property on the ground that the acknowledgment of the deed by their mother, she being a *feme covert*, was defective. And so the court ruled in the above instruction.

The deed was acknowledged on 12 March, 1811, the day it bears date, by Elizabeth Henry, who signed it and who had a dower interest in the lot, and by Fairbairn and wife, the latter being examined separate and apart from her husband, in due form, before the Mayor of Baltimore, who affixed his certificate and the seal of the corporation to the acknowledgment.

On 20 May, 1811, Warden Pope, Clerk of the County Court of Jefferson, in which Louisville is situated, certified that the deed was received in his office, and it being duly certified and authenticated, he recorded the same.

By the Virginia act of 1776 adopted by Kentucky, 4 Litt.Laws of Kentucky 432, entitled "An act to enable persons living in other

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countries to dispose of their estates in this commonwealth with more ease and convenience," it was provided

"That a person residing in any other county, for passing any lands and tenements in this commonwealth by deed, shall acknowledge or prove the same before"

the mayor or other chief magistrate of the city, town or corporation wherein or near to which he resides. But where there was no mayor or other chief magistrate within

the county, then a certificate, under the hands and seals of two justices or magistrates of the county, that such proof or acknowledgment has been made before them, is sufficient. Without an acknowledgment, the fee did not pass under this statute. And

"Where any person making such conveyance shall be a *feme covert*, her interest in any lands or tenements shall not pass thereby unless she shall personally acknowledge the same before such mayor or other chief magistrate, or before two justices or magistrates, as aforesaid."

A privy examination is required, and the same being certified, the deed may be recorded in the county where the land lies. And such deed shall be effectual to pass all the interest of the *feme covert*.

The acknowledgment of the deed under consideration in all respects conforms to the requirements of the above act, and the important question is whether, at the time of the acknowledgment, the act was in force? If the act had not been repealed, the deed is unquestionably valid.

The plaintiffs in error contend that the above statute was repealed by the act of 1785, and also of 1796. The act of 1785 is entitled "An act for regulating conveyances," in the 1st section of which it is provided,

"That no estate of inheritance or freehold or for a term of more than five years in lands or tenements shall be conveyed from one to another unless the conveyance be declared by writing, sealed and delivered, nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, unless acknowledged or proved before the General Court, or before the court of the county, city, or corporation, in which the land is conveyed, or in the manner hereinafter directed,"

&c.;

"When husband and wife shall have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being

examined privily and apart from her husband, by one of the judges thereof &c.; or if before two justices of the peace, of that county in which she dwells, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded,"

&c.;, shall be sufficient to convey her estate.

In this act there is no express repeal of the act of 1776; consequently that act can only be repealed insofar as it may be repugnant to the subsequent act. They are both affirmative statutes, and such parts of the prior statute as may be incorporated into the subsequent one, as consistent with it, must be considered in force. This

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is a settled rule of construction, and applies with peculiar force, to these statutes. Their object was to prescribe certain modes by which real property within the commonwealth should be conveyed, by residents and nonresidents, and also by *femes covert*, and it must be admitted, that no other modes of conveyance than those which are so prescribed will be valid. These forms have been adopted for the security of real property, and the convenience of individuals; hence we find in the statute books of all the states, numerous acts regulating the signing, acknowledging, and recording of deeds.

If the act of 1785 be not repugnant in all its provisions to the act of 1776, yet if the former clearly intended to prescribe the only modes by which real estate should be conveyed, it repeals the prior act. And this intention, it is said, is found in the act of 1785. To some extent, this may be correct. In the first section of that act it is provided that

"No estate of inheritance in lands or tenements shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered."

Now a deed, to be valid as a conveyance under this statute, must be in writing, sealed and delivered. This is the common law definition of a deed. But there are

other requisites to make this conveyance valid against a purchaser for a valuable consideration without notice. The deed must be acknowledged as the statute requires and lodged with the clerk for record. The conveyance as between the parties would be valid under this statute without acknowledgment, but unless acknowledged and recorded, or lodged for record, would not be notice to subsequent and innocent purchasers.

The acts under consideration provide specially the mode by which the estate of a *feme covert* shall be conveyed. In the act of 1785, her privy examination may be made in court or by one of the judges thereof, or she may be examined by two justices of the peace of the county where she resides, "who may be empowered to do so by commission," &c.;

By the act of 1776, the acknowledgment and privy examination of a *feme covert* were required to be made before the mayor or other chief magistrate, or before two justices or magistrates of the town or place wherein she shall reside. The acknowledgment before two justices is retained in the act of 1785, with this additional requisite, that the justices shall be commissioned, as provided, to perform this duty. This necessarily repeals that part of the prior act which authorized the acknowledgment to be taken before two justices without being commissioned. The latter act is, in this regard, repugnant to the former. The provisions cannot stand together, as the latter act superadds an essential qualification of the justices not required by the former. But the important question is whether, as the act of 1875 made no provision authorizing a mayor of a city to take the acknowledgment of a *feme covert*, that provision in the act of 1776 is repealed by it. In this respect it is clear there is no

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repugnancy between the two acts. The two provisions may well stand together; the latter as cumulative to the former.

Does a fair interpretation of the act of 1785 authorize the inference that the legislature intended no conveyance by a *feme covert* should be valid unless

acknowledged in the form prescribed by that act? We think no such inference can be drawn. In the first section of that act, in reference to ordinary acknowledgements of conveyances, in order, when recorded, that they might operate as notice to subsequent purchasers, it is required that the acknowledgment should be made as provided, "or in the manner hereinafter directed." The words here cited can have no bearing on the execution of a conveyance by a *feme covert*. In a subsequent part of the same section, provision is made for the execution of such an instrument, which is complete, without reference to any other part of the statute. The above words therefore could only refer to the conveyances spoken of in the first part of the section and in order that they might operate, when recorded, as notice.

Upon a careful comparison of these statutes as regards the point in controversy, we think there is no repeal of the act of 1776 by the act of 1785. There is no express repeal; no repugnancy, as regards the power of the mayor of a city to take the acknowledgment of a *feme covert*; nor on this point are there any words of the latter act which show an intention to make its provisions exclusive. We are therefore brought to the conclusion, looking only at these statutes, that the latter act in this regard may be considered as cumulative.

As having a strong and decided bearing on this view we refer to [Wood v. United States](#), 16 Pet. 362. In that case, the Court said

"The question then arises whether the 66th section of the act of 1799, chap. 128, has been repealed, or whether it remains in full force. That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

We come now to consider the act of 1796. The act of 20 December, 1792, concerning the relinquishment of dower, in the 2d section, provides that dower may be relinquished before two justices of the peace where the parties reside out of the commonwealth, and the clerk of the county is required to certify that the persons taking the acknowledgment were justices &c.; This provision is repugnant to that of the act of 1785, which requires a commission to be issued to such justices.

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By the Act of 17 December, 1795, two persons were authorized to be appointed by joint ballot of the legislature to revise the laws in force &c.; These persons, having been so appointed, reported the act of 1796, which is entitled "An act to reduce into one the several acts, or parts of acts, for regulating conveyances." In this act are included parts of the act of 1776 and nearly the whole of the act of 1785. It was passed 19 December, 1796, and, with all other acts reported at the same time, was adopted by a general act, referring to the various acts and providing that

"So much of every act or acts before recited as comes within the purview of this act shall be and the same is hereby repealed from and after 1 January, 1797,"

on which day the above act took effect.

That part of the act of 1776 authorizing the mayor of a city to take the acknowledgment of a *feme covert* is not included in the act of 1796, nor were certain provisions of the act of 1748 "for settling the titles and bounds of lands," &c.;, included, some parts of which have since been recognized by the Court of Appeals of Kentucky as in force.

Great reliance is placed by the counsel for the defendants in error in the case of *Hynes' Representatives v. Campbell*, 6 Mon. 286. In that case the complainants prayed a rescission of the contract for the conveyance of a certain tract of land on the ground of a defect of title, and the court held that they were not bound to accept the deed for the land tendered by the defendant, as some of the

conveyances under which he claimed were not acknowledged and recorded, as the law required. The deeds thus objected to

"were acknowledged before two justices of the peace of Dunwiddie County, Virginia, who certified simply that the grantor acknowledged the same before them, as the law required,"

without adding that the grantor "also subscribed the same in their presence." This proceeding was under the act of 1792, which had been construed to require a certificate of the justices that the deed had been subscribed in their presence, in regard to deeds executed within the state. And the court said it turned its attention to the act of 1776,

"and it find that it regulates only conveyances made out of the state, and that it provides for acknowledgement alone, before two justices of the peace, and says not a word about subscribing, and if that act is in force in this respect, it will exactly embrace the case in question."

And it held that the above act was virtually repealed by the act of 1785, which requires that the two justices taking the acknowledgment should be commissioned to do so. This view of the court, as regards the acknowledgments of the deeds then before it, was undoubtedly correct. It is the construction which we have before given to this part of the act of 1785. The attention of the court was not drawn to any other point than the one before it. It did not say that that part of the act of 1776 which regulates the acknowledgment

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by a *feme covert*, which is wholly different from the above, was repealed. It is true its language is general, but its meaning must be limited to the point under consideration. This decision therefore cannot be considered as having a bearing on the point now before us.

In the case of *Prewet v. Graves*, 5 J.J.Marsh. 120, the court said that the 5th section of the act of 1748 had been repealed by subsequent and repugnant

enactments. In *Miller v. Henshaw & Co.*, 4 Dana 323, it said, in reference to the act of 1776, and to the decision of *Hynes' Representatives v. Campbell*, above cited, that the act of 1776

"is nowhere repealed by express words, but only by construction, in consequence of the inconsistency of its provisions with those of subsequent statutes, and as none of the subsequent statutes relates to the authentication of deeds of personalty out of the state except those which reduce the number of witnesses from three to two, there can be no inconsistency, and therefore no constructive repeal of so much of this statute as relates to deeds of personalty, except as to the number of witnesses."

In *McGowen v. Hay*, 5 Litt. 244, the court held the act of 1748 was in force in Kentucky in regard to the acknowledgment and recording of mortgages and deeds of trust. By the act of 1796, a deed, executed out of the commonwealth for lands within it, was required to be recorded in eight months. The act of 1785, which preceded it, required such deed to be recorded in eighteen months; and in *Taylor v. Shields*, 5 Litt. 297, the question was whether the latter of these acts in this respect had repealed the former, and the court said

"We should hesitate much to give such effect to the latter statute. . . . Virtual repeals are not favored by courts. A body of acts ought to be held as one act, so far as they do not conflict with each other. Here, the same restriction to the 'manner prescribed by law' existed before the passage of our act, as well as afterwards, and if, in transcribing the Virginia Code into ours, any part shall be adjudged to be repealed barely by putting in the date of transcribing as the date of the law, and because the provision, so transcribed, shall apparently conflict with any former part not so transcribed, it may be of serious consequence to the community. . . . We incline,"

the court said, to the opinion

"that the clause in our statute [of 1796] 'in the manner prescribed by law' meant to retain and was intended to retain former provisions with regard to deeds entire,"

and it held that the recording of the deed within eighteen months under the act of 1785 was sufficient.

That part of the act of 1785 which regulated the time of recording deeds executed without the commonwealth was not copied into the act of 1796, and yet the court held that the latter act in this respect did not repeal the former.

In [*Elliott v. Piersoll*](#), 1 Pet. 339, this Court said the Virginia statute of 1748 "was adopted in Kentucky, at her

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separation from Virginia, and is understood never to have been repealed."

It does not appear that the question, as to the validity of the acknowledgment of a deed before the mayor of a city, by a *feme covert*, under the act of 1776, since that of 1785 has been enacted, has ever been decided. Some general expressions, as above stated, have been used by the Court of Appeals in regard to the repeal of the former act by the latter, but those expressions did not relate to the above question. And it may be again observed that those remarks by the Court of Appeals can only be held to apply to the matter then before it, and that a more extended application of them would be inconsistent with the views taken by the same court in the other cases cited. If the provision in the act of 1785, requiring a deed executed out of the state to be recorded in eighteen months, is not repealed by the act of 1796, requiring such deed to be recorded in eight months, is the act of 1776, authorizing the acknowledgment of a deed before a mayor, by a *feme covert*, repealed by subsequent acts? None of those acts repeal, in terms, the above provision in the act of 1776, and they contain no repugnant provision. Consequently, the first act stands unrepealed. The different acts on the same subject, in the language of the Court of Appeals, must be "considered as one act." In this view, the provision in question stands consistently with all the subsequent statutes, and on this ground we feel authorized to say, that the acknowledgment of the deed before us is valid, under the act of 1776, and that it conveyed to Ferguson, the grantee, a good title in fee simple. The clause of the act of 1796,

"repealing so much of the acts referred to as come within the purview of that act," extends no further than the repugnancy of the act of 1796 to the provisions of the acts named.

Upon the whole, the judgment of the circuit court is

Reversed at the costs of the defendants, and the cause be remanded, &c.;

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