Kennedy Vs. Nedrow

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Court : US Supreme Court

Decided On : 1789

Appeal No. : 1 U.S. 415

Appellant : Kennedy

Respondent : Nedrow

Judgement :

KENNEDY v. NEDROW - 1 U.S. 415 (1789)
U.S. Supreme Court KENNEDY v. NEDROW, 1 U.S. 415 (1789)

1 U.S. 415 (Dall.)

Kennedy
v.
Nedrow, et Ux. et al.

Supreme Court of Pennsylvania

April Term, 1789

This was an action of dower in 250 acres of land in Lancaster county, brought by Anne Kennedy, widow, who was the wife of Richard Johnson, deceased, against Thomas Nedrow, and Anne, his wife, Catherine Wistar, and Rebecca Martin. The Tenant pleaded, first, a special plea, 'That Richard Johnson, the husband, on the

12th of August, 1767, made his will, and thereby devised a moiety of 500 acres of land to his wife, the demandant, in fee; which devise was in lieu of dower:' And, secondly, they pleaded, 'That the demandant had sued out a writ of partition against the tenants for making partition of the said 500 acres of land, and had recovered. &c.;' To these pleas the demandant replied, the tenants demurred, the Demandant joined in demurrer, and issues.

On the first plea a case was stated in substance as follows: 'That on the 12th of August, 1767, Richard Johnson made his last will and testament, and therein bequeathed and devised in bac verba; 'Imprimis, I give and bequeath unto my loving wife, Ann Johnson, all that my lot of ground, situate &c.; which I bought of John Millar, &c.; with the houses, barns, and other appurtenances thereunto belonging: Also, all my household goods, horses, live stock, and other moveables, which I have here in Lancaster, and in Germantown, Philadelphia county, to her, her heirs and assigns forever: Also L1000 lawful money of Pennsylvania, in bonds and bills, to be paid to her, or her heirs and assigns, in six months time after my decease, with interest, by my executor herein after named. I give and bequeath unto my brother John Johnson,

and to each of his three sons, and his daughter, &c.; the sum of L5, to be paid three months after my decease, &c.; I give and bequeath unto my sister Anne Nedrow, all that my 300 acre tract of land, situate, &c.; with the appurtenances, to her, her heirs and assigns forever. I give and bequeath unto my sister Catharine Wistar, all that my 300 acre tract of land, situate, &c.; to her, her heirs and assigns forever. I give and bequeath unto my loving (wife) Anne Johnson, the one moioty or undivided half of all that my 500 acre tract of land, situate, &c.; to her, her heirs and assigns forever: Provided always that if my said wife Anne Johnson after my decease, should be married to another man, that then she shall have the said moiety during her life, with sufficient power to give and bequeath the same at her decease, to whomsoever the will, excepting to her second husband, or any from or under him. I give and bequeath the other moiety, or undivided half part of my said 500 acre tract of land unto my three sisters, Ann, Catharine, and Rebecca, each

one third part, to them, their heirs, and assigns forever. My will is that there be no water works built or erected on any part of the said 500 acre tract of land for the space of , &c.; I give and bequeath my tract of land lying, &c.; unto my sister Ann, and to her heirs and assigns forever; under and subject to the yearly rent of 40s &c.; to be paid to my loving wife, Ann Johnson, and to her heirs and assigns forever. I give and bequeath unto my sister Catharine, my twenty and odd acres of land, lying, &c.; and the appurtenances; also, twelve acres of wood land to be cut off a large tract adjoining, &c.; to be holden by her, her heirs and assigns forever; under and subject to the yearly rent of L6, to be paid to my loving wife Ann Johnson, her heirs and assigns forever, and also subject to as much firewood as my wife shall have occasion for, when she comes to live at Germantown. I give, devise, and bequeath to my sister Rebecca, and her son Paul, all that my tract of land (the remainder after the said 12 acres are taken off) containing 50 acres, more or less, adjoining, &c.; to be holden to them, their heirs and assigns forever; under and subject to the yearly rent of L4 to be paid to my loving wife, Ann Johnson, her heirs and assigns forever; the said tract not to be sold till Paul arrives at 30 years of age. I give and bequeath unto my sister Ann, all that my tract of 12 acres opposite the last mentioned 50 acres, &c.; to her heirs and assigns forever. I give and bequeath L50 to the poor house keepers of Germantown, &c.; I give and bequeath L50 to the use of the Pennsylvania Hospital. As concerning all the rest and residue of my effects, bills, bonds, mortgages, monies, and estate whatsoever, not herein before given, I would have divided equally between my loving wife Ann, and my sisters, Ann, Catharine, and Rebecca, part and share alike to each of them, their heirs and assigns forever. And I do appoint and nominate my loving wife, Ann Johnson, &c.; to be executors of this my last will and testament.'

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The question for the opinion of the Court on this plea and case, is, whether, upon the whole will, the devises and bequests therein contained, or any of them, to the said Anne, the demandant, made, are sufficient in law to bar the said Anne from recovering her said dower?' The cause was argued at the last term by Sergeant

and Bradford, for the Demandant; and Coxe and Lewis, for the Tenants: And now the Chief Justice delivered the opinion of the Court to the following effect:

M'Kean, Chief Justice. Two questions have been made on this record, in the discussion of which, the law relating to the subject has been exhausted; The first is, 'Whether the devises to the Demandant in the will of Richard Johnson, shall be deemed a satisfaction of her dower?' And the second is, 'Whether by the action of partition brought by the Demandant, wherein it is acknowledged that the moiety, out of which dower is now claimed, belonged to the Tenants, she is not stopped from recovering in this action?' In delivering our opinion on this occasion, we shall avoid a recapitulation of the arguments offered by the counsel on either side; confining ourselves to the questions proposed, a brief statement of the reasons of our judgment, and a referrence to the books, on which we rely, as authorities to support it. 1. Dower is a legal, an equitable, and a moral right. Prec. in Chan. 244. It is favored in a high degree by law, and, next to life and liberty, held sacred. Lill. Abr. 666. G. Three incidents entitle a woman to dower: Marriage, seisin, and the death of the husband. 1 Inst. 32.a.b. And a widow may be barred of dower by a jointure made in pursuance of the statute of 27. H. 8. c. 10. sect. 6. Such a jointure may, indeed, be made either before, or after, marriage; but with this difference, that if it is made before, the wife cannot wave it, and claim her dower at common law; which she can do, if the jointure is subsequent to the marriage. No other settlements, however, in lieu of jointures, are bars to a claim of dower; nor, it must be remembered, was a jointure itself any bar antecedent to the passing of the statute of H 8. for, it is established law, that a right, or title, of dower, cannot be barred by a collateral satisfaction. Wood's Inst. 125. 1 Inst 36. b. Nor, in short, by any thing but a plain and express intention of the parties. Ibid. Finch Rep. 368. 1 Chan. Ca. 181. 2 Chan. Ca. 24, 2 Vent. 340. 4 Co. 1.2. In the will before the Court, it is no where expressed, that the devises to the Demandant shall be in lieu of dower; but, it is contended, that the intention of the testator, collected from the words of the whole will, appears to be, that the Demandant shall be barred of her claim at Common law; that the devises to her are of lands in fee; and that these, being of four times the value of her dower, ought to be considered as a recompense, or satisfaction, for

it. But in the words of the whole will, we can discover no express intention to that purpose; and, although an estate for life, or even during widowhood (which is the same as an estate for life, since it is in the wife's own power to make it such; and these, by the bie, are the lowest estates that will operate in bar of dower, either in a jointure, or will) may be given with the view, and operate to bar a widow's claim at common law; yet, it must appear to be so intended by the words of the will, and not inferred from its silence, or presumed upon conjecture: For, no devise to a wife, even of an estate in fee simple, although ten times more valuable than her dower, will be, of itself, a bar of dower; but, it will be considered as a benevolence, and she is entitled to both. 2 Freem. Rep. 242. Prec. in Chan. 133. Nor, in such a case, will equity interpose against the wife; for, I cannot find any instances in which relief upon this subject, has been given, but in the following: first, Where the implication, that she shall not have both the devise and the dower, is strong and necessary; secondly, Where the devise is entirely inconsistent with the claim of dower; and thirdly, Where it would prevent the whole will from taking effect; that is, where the claim of dower would overturn the will in toto. 3 Atk. 437. In short, the authorities are numerous and explicit, that dower cannot be barred by a collateral recompence; that the devise of any thing to a wife, cannot be averred to be in bar of dower, because a will imports a consideration in itself; and that the devise, without other matter, is to be taken as a benevolence, and the devisee deemed a purchasor. 4 Co. 3. 4. 9 Mod. 152. 2 Vern. 365. 2 Freem. Rep. 242. Prec. in Chan. 133. 2 Will. 624. 3 Atk. 8. 436. 1 Ld. Raym. 436. 1 Lutw. 734. Brook(tit.Dower) pl.69. Dyer 248. 1 Vez. 55. 230. 2 Eq. Abr. 388. pl. 14. 18. 1 Eq. Abr.219. 1 Brown. Chan. Rep. 292. To which may be added two decisions in this Court, Blackford et ux. vs. Kennedy, in 1769: And Kennedy et ux. (the present Demandant) vs. Wistar, in 1779. The Court, therefore, unanimously think, that the devises to the Demandant, in the will of Richard Johnson, cannot be deemed a satisfaction or bar of dower in this action. 2. The second question, enquires, whether the Demandant is barred in this action, by the recovery in the action of partition? And, in support of the affirmative, the counsel for the tenants have cited 1 Roll. Abr. 862. pl. 4.864. pl.8.Co. Litt. 27.a. Dower is an excrescent interest taken out of the inheritance for

a time, which being elapsed, the interest falls again to the owner of the inheritance. But the institution of the action of partition became necessary to appropriate a moiety of the 500 acres of land to each of the devisees, not merely for life, but forever; for, the judgment is, that the partition should remain firm and stable forever. If, then, any other person than the Demandant, had a right of dower in the whole of the 500 acres, although such person could not have been made a party in the partition, the partition

might certainly have been effected, notwithstanding that right of dower. And why should not the same be done in the case before the Court? The devisee held the moiety allotted to her, subject to the claim of dower; and, in doing this, there was nothing inconsistent, or uncommon: Nor, can we perceive, how the recovery in partition, estops the Demandant from saying, that she has a claim of dower in that part of the premisses which has been assigned to the Tenant. As, indeed, on the one hand, there is no case, nor dictum of any Judge, to warrant this plea, so, on the other, we think reason and justice are against it. The case cited by the counsel for the Tenants only says, that, in dower, the Demandant claims dower of lands unde nihil habet &c.; and, therefore, she shall be stopped from claiming anything more.

Upon the whole, the Court are clearly of opinion, and direct, that judgment be entered for the Demandant.