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Herbert Vs. Wren

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Court : US Supreme Court

Decided On : 1813

Appeal No. : 11 U.S. 370

Appellant : Herbert

Respondent : Wren

Judgement :

Herbert v. Wren - 11 U.S. 370 (1813)
U.S. Supreme Court Herbert v. Wren, 11 U.S. 7 Cranch 370 370 (1813)

Cranch 370

Herbert v. Wren

11 U.S. (7 Cranch) 370

ERROR TO THE CIRCUIT COURT OF THE COUNTY

OF ALEXANDRIA IN THE DISTRICT OF COLUMBIA

SYLLABUS

Courts of chancery have concurrent jurisdiction with courts of law, in cases of dower, especially where partition, discovery, or account is prayed and in cases of sale where the parties are willing that a sum in gross should be given in lieu of dower.

If a devise of land in Virginia to the widow appear from circumstances to be intended in lieu of dower, she must make her election, and cannot take both.

If a wife join her husband in a lease for years, she is still entitled to dower in the rent.

A court of chancery cannot allow a part of the purchase money in lieu of dower when the estate is sold unless by consent of all the parties interested.

Error to the Circuit Court for the District of Columbia sitting at Alexandria, in a suit in chancery brought by Richard Wren and Susanna, his wife, who was the widow of Lewis Hipkins, deceased, and John and Westley Adams, her trustees, against W. Herbert, T. Swann, R. B. Lee, and W. B. Page, trustees of Philip R. Fendall, deceased, and E. I. Lee, Jos. Deane, and F. Green.

The case was stated by MR. CHIEF JUSTICE MARSHALL in delivering the opinion of the Court as follows:

This suit was brought by Richard Wren, and Susanna, his wife, formerly the wife of Lewis Hipkins, praying that dower may be assigned her in a tract of land of which her former husband died seized and which has since been sold and conveyed to the defendant Joseph Deane, or that a just equivalent in money may be decree her in lieu thereof.

The material circumstances of the case are these:

Lewis Hipkins, being seized as tenant in common with Philip Richard Fendall of one-third of a tract of land lying in the County of Fairfax, by his deed executed

by himself and wife leased the same to Philip Richard Fendall for the term of thirteen years, to commence on the first of September in the year 1794 at the annual rent of 140.

In the year 1794, Lewis Hipkins departed this life, having first made his last will and testament in writing in which he devised both real and personal estate to his wife, the real estate for her life with remainder to his three daughters.

To his two sons he devised the premises in question and added that if, during the minority of his sons, Philip R. Fendall should erect thereon another water mill or water mills, has desire was that his sons or the survivor of them should, at the expiration of the lease for years made to the said Philip, pay one-third part of the value of such mill or mills, and in default of payment that P. R. Fendall should be permitted to hold the same at the present rent until the value should be received.

He directed his two tracts of land in Loudon to be sold for the payment of his debts, and appropriated the annual rent accruing on the lands leased to P. R. Fendall to the education and maintenance of his children.

The testator then adds the following clause:

"If it should so happen that the remaining part of my estate not herein bequeathed should prove insufficient to pay all just demands against my estate, then my will and desire is that my executors shall sell as much of my real and personal estate as may be necessary to make up the deficiency, and that they shall sell such parts as will divide the loss among my representatives as nearly as may be in proportion to the property bequeathed to them and each of them."

On 13 December, 1797, Susanna Hipkins, then the widow of Lewis Hipkins, conveyed her dower in the premises in question and also in the land devised to her for life by her deceased husband to the plaintiffs, John Adams and Westley Adams, in trust for her use.

In the year 1803, P. R. Fendall and Walker Muse instituted a suit against the executors and children of Lewis Hipkins, deceased, and in the month of June in that year the cause came on to be heard by consent of parties, when the court decreed that the whole estate of Lewis Hipkins be sold and the money brought into court.

The report of the sale does not appear on the record, but an entry was made that the report was made and confirmed by the court.

Under this decree the premises were sold and conveyed to the defendant E. I. Lee, who purchased in trust for P. R. Fendall, one of the executors of Lewis Hipkins. On the deed of conveyance is a memorandum stating that the property was sold subject to dower.

Lee conveyed the premises to the other defendants, trustees of P. R. Fendall, for the purposes of a trust deed which had been previously executed conveying to them the other two-thirds of the same estate on certain trusts in the deed recited.

The trustees sold and conveyed to the defendant, Joseph Deane.

The bill states that the defendant Joseph Deane had not paid the purchase money, and was willing, should the court decree dower in the premises, to give an equivalent in money in lieu thereof.

Soon after the trust deed from Susanna Hipkins to John and Westley Adams, she intermarried with the plaintiff Richard Wren.

Philip R. Fendall continued to pay the plaintiff, Susanna, during her widowhood, and the plaintiffs, Richard and Susanna, after their intermarriage, one-third part of the rent accruing on the premises devised to him by Hipkins and wife until the year 1803, since which he has refused or neglected to pay the same.

The defendants, the trustees of Philip Richard Fendall, he having departed this life previous to the institution of this suit, insist:

1. That the remedy of the plaintiffs, if they have any, is at law, and that a court of equity can take no jurisdiction of the cause.

2. That the provision made by the will of Lewis Hipkins for the plaintiff Susanna not having been renounced by her, bars her right of dower in his estate.

The defendant Joseph Deane has put in no answer, and as against him the bill is taken as confessed.

The circuit court determined that the claim of the plaintiff Susanna to dower was not barred, and decreed her a sum in gross as an equivalent therefor.

From this decree the trustees of Philip Richard Fendall have appealed. The plaintiffs also object to so much of the decree as refuses them rent on the premises, and have therefore taken out likewise a writ of error.

Page 11 U. S. 376

MR. CHIEF JUSTICE MARSHALL, after stating the case, delivered the opinion of the Court as follows:

The material questions in the cause are:

1. Has a court of equity jurisdiction in the case?

2. Is the plaintiff Susanna entitled to dower?

3. If these points be in her favor, what decree ought the Court to make?

According to the practice which prevails generally in England, courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist in England in favor of this jurisdiction, one of which is that partitions are made and accounts are taken in chancery in a manner highly favorable to the great purposes of justice. In this case, dower is to be assigned in an undivided third part of an estate, so that it is a case of partition of the original estate as well as of

assignment of dower in the part of which Lewis Hipkins died seized.

Page 11 U. S. 377

An additional reason and a conclusive one in favor of the jurisdiction of a court of equity is this: the lands are in possession of a purchaser who has not yet paid the purchase money. A court of law could adjudge to the plaintiffs only a third part of the land itself. Now if the plaintiffs be willing to leave the purchaser undisturbed, to affirm the sales, and to receive a compensation for her dower instead of the land itself, a court of equity ought never, by refusing its aid, to drive her into a court of law and compel her to receive her dower in the lands themselves. This is therefore a proper case for application to a court of chancery.

2. It is perfectly clear that the provision made by Lewis Hipkins in his last will is no bar to a claim of dower for several reasons, of which it will be necessary to mention only two.

1. It is not expressed to be made in lieu of dower.

2. It is not averred that she has accepted the provision and still enjoys it.

3. It remains to inquire what decree the court ought to make in the case.

The first question to be discussed is this: is the plaintiff Susanna entitled both to dower and to the provision made for her in the will of her late husband?

The law of Virginia has been construed to authorize an averment that the provision in the will is made in lieu of dower, and to support that averment by matter *dehors* the will. But with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the will itself, the act of the Virginia Legislature is not understood in any respect to vary the previously existing common law.

In the English books there are to be found many decisions in which the widow has been put to her election either to take her dower and relinquish the provision made

for her in the will or to take that provision and relinquish her dower. There are other cases in which

Page 11 U. S. 378

she has been permitted to hold both. The principle upon which these cases go appears to be this:

It is a maxim in a court of equity not to permit the same person to hold under and against a will. If therefore it be manifest from the face of the will that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it, if his intention discovered in other parts of the will must be defeated by the allotment of dower to the widow, she must renounce either her dower or the benefit she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both.

The cases of *Arnold v. Kempstead,* of *Villarael v. Galway,* and of *Jones v. Collier,* reported by Ambler, are all cases in which, upon the principle that has been stated, the widow was put to her election.

In the case under consideration, neither party derives any aid from extrinsic circumstances, and therefore the case must depend on the will itself.

The value of the provision made for the wife compared with the whole estate is not in proof, but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify.

The only fund provided for the maintenance and education of his five children is the rent of 140 per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower.

That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill and not receiving from the sons of the testator their half of its value, to hold the

premises until the rent should discharge that debt indicates an intention that in such case the whole rent should be retained.

The clause, too, directing the residue of his estate to be sold for the payment of debts is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property without any regard to the encumbrance of dower.

Upon this view of the will, it is the opinion of the majority of the Court that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both.

She has not, however, lost the right of election. No evidence is before the Court that she has accepted the provision of the will, nor that she still enjoys it. Indeed there is much reason to suppose the fact to be otherwise. The decree of 1803 does not except the lands decreed to her for life from its operation, nor is the Court informed by the evidence that those lands were not sold under it.

But if she had accepted that provision and still enjoyed it, there is no evidence that she considered herself as holding it in lieu of dower. On the contrary, she was in the actual perception of one-third of the rent accruing on the lease hold by P. R. Fendall, and in the deed executed by her in 1797, before her second marriage, she conveys her dower in the lands leased to Fendall, and also her dower in the lands devised to her by her deceased husband. It is therefore apparent that she never intended to abandon her claim to dower.

The next inquiry to be made by the Court is to what profits is the plaintiff, Susanna, entitled in consequence of the detention of dower.

It is unnecessary to decide whether in general a person claiming dower from a purchaser can recover profits which accrued previous to the institution of her suit. In this case, the plaintiff was in the actual enjoyment of dower. She received one-

third of the rent accruing from the premises for nine years. She was therefore in full possession of her dower estate, and when afterwards the land was sold under a decree of a

Page 11 U. S. 380

court, P. R. Fendall was one of the executors who made the sale, and was himself in effect the purchaser of the estate. Upon no principle could he justify the refusal to pay that portion of the rent which was equal to her dower in the land unless on the principle that she was not entitled to dower. In this case, therefore, the plaintiff is entitled to one-third of 140 per annum for the remaining four years of the lease under which P. R. Fendall held the land, and to an account for profits after the expiration of the lease.

But the plaintiff Susanna cannot claim the profits on her dower and hold any portion of the particular estate devised to her or of the profits on that estate. An account therefore must be taken, if required by the defendants, showing what she has received under the will of her husband. This must be opposed to the profits to which she is entitled for dower, and the balance placed to the credit of the party in whose favor it may be.

It remains to inquire whether the allowance of a sum in gross in lieu of dower in the land itself, or of the interest on one-third of the purchase money, might legally be made.

This must be considered as a compromise between the plaintiffs and the defendant Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist that instead of a sum in gross, one-third of the purchase money shall be set apart and the interest thereof paid annually to the tenant in dower during her life.

If the parties all concur in preferring a sum in gross to the decree which the court has a right to make, still it is uncertain on what principle seven years were taken as the value of the life of the tenant in dower. It is probably a reasonable estimate,

but this Court does not perceive on what principles it was made, nor does the record furnish the means of judging of its reasonableness.

This Court is of opinion that there is error in the decree of the circuit court in not requiring the plaintiff

Page 11 U. S. 381

Susanna to elect between dower and the estate devised to her by her late husband, and in not allowing profits on her dower estate if she shall elect to take dower. The decree is to be

Reversed and the cause remanded for further proceedings in conformity with the following decree.

This Court is of opinion that the plaintiff, Susanna, is not barred of her right of dower in the lands of which her late husband, Lewis Hipkins, died seized, but that she cannot hold both her dower and the property to which she may be entitled under the will of the said Lewis. She ought therefore to have made her election either to adhere to her legal rights and renounce those under the will, or to adhere to the will and renounce her legal rights, before a decree could be made in her favor.

This Court is further of opinion that the plaintiff Susanna, having been in possession of her dower by the receipt of rent for several years after the death of her late husband, is, in the event of her electing to adhere to her claim of dower, entitled to receive from the estate of P. R. Fendall the profits which have accrued on her dower estate in his possession from the time when he ceased to pay the same until the sale was made to the defendant Joseph Deane, and is entitled to receive from the said Joseph Deane the profits which have accrued thereon since the same was sold and conveyed to him to ascertain which an account ought to be directed. And the Court is further of opinion that an account ought also to be directed to ascertain how much the said Susanna has received from the estate of her late husband, and what profits she has received from the estate devised to her in his will, all which must be deducted from her claim for dower.

The Court is further of opinion that if the parties or either of them shall be dissatisfied with the allotment of a sum in gross and shall prefer to have one-third part of the purchase money given by the said Joseph Deane for the lands in which the plaintiff Susanna claims dower set apart and secured to her for her life, so that she may receive during life the interest accruing thereon,

Page 11 U. S. 382

and shall apply to the circuit court to reform its decree in this respect, the same ought to be done.

It is the opinion of this Court that there is no error in the decree of the Circuit Court for the County of Alexandria in determining that the plaintiff Susanna was entitled to dower in the estate of her late husband, Lewis Hipkins, deceased, but that there is error in not requiring her to elect between her dower and the provision made for her in the will of her late husband, and in not decreeing profits on the same. This Court doth therefore

Reverse and annul the said decree and doth remand the cause to the said circuit court with instructions to reform the said decree according to the directions herein contained.

JOHNSON, J. dissented from the opinion of the Court, but did not state his reasons.

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